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# RECORD, CASE No. 14,744.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1892.**

TERM No., ~~895~~. 550

CHARLES DE ARNAUD, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

**FILED JULY 16, 1891.**

# RECORD, CASE No. 14,744.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1892.

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CHARLES DE ARNAUD, APPELLANT,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 6, 1893.

1 In the Court of Claims.

CHARLES DE ARNAUD
*vs.*
THE UNITED STATES. } 16442.

I.—*Communication from the Secretary of the Treasury Referring Claim. Filed January* 28, 1889.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *January* 25, 1889.

To the honorable the Chief Justice and judges of the Court of Claims:

Under the provisions of section 1063 of the Revised Statutes of the United States, I transmit herewith to your honorable court, upon the recommendation and certificate of the Second Comptroller, the claim of Charles de Arnaud for services as military expert, now pending in this department and involving disputed facts and controverted questions of law, with all the vouchers, paper-, proofs, and documents pertaining to said claim, for trial and adjudication by your honorable court as provided by law.

Respectfully yours, HUGH S. THOMPSON,
*Acting Secretary.*

2 II.—*Petition. Filed March* 13, 1889.

CHARLES DE ARNAUD
*v.*
THE UNITED STATES. } No. 16442.

To the honorable the judges of the Court of Claims of the United States:

The petition of Charles de Arnaud respectfully represents:

That he is a citizen of the United States and a resident of the State of New Jersey.

That he was born in Russia and educated at the Academy of Engineers, at St. Petersburg, Russia, where he graduated as an officer of the Russian army in the year 1855; that he served in the army of the Crimea as lieutenant of engineers until the close of the Crimean war, when he was appointed on special service similar to the service performed as hereinafter set forth, and subsequently came to this country in the year 1860, and was, in the month of July,
3 1861, recommended by General Lovett H. Rousseau, United States Army, to Major General John C. Fremont, then in command of the western department United States Army, with headquarters at St. Louis, Missouri, as a duly qualified person of reliability, who might be employed in the military service of the United States to great advantage to the United States Government.

That on or about the 31st day of July, 1861, General Fremont, acting upon such recommendation, for and on behalf of the United States Government, employed your petitioner as a military expert to perform "special and important duties," as hereinafter set forth.

That your petitioner, acting upon instructions received from General Fremont, obtained a full and complete map of all pikes, roads, batteries and masked batteries of Tennessee and Kentucky, including Fort Henry on the Tennessee river, and Fort Donelson on the Cumberland river; and accompanying said map was a full description of the strength and probable movements of the Confederate army of Tennessee, Kentucky, and southeastern Missouri, which said map and information were delivered by your petitioner to General Fremont, at the latter's request, on or about the 12th day of August, 1861.

That said map and information, which were obtained at great personal expense and risk of your petitioner's life within the Confederate lines, were of great service and most valuable to General Fremont, and were used by him in preparing his plan of campaign against the Confederate forces.

That thereafter, in recognition of the services theretofore rendered by your petitioner, he was, on said 12th day of August, 1861, re-employed by General Fremont, acting for and on behalf of the Government of the United States, to continue in the employ of the Government as aforesaid.

That at the time of our petitioner's employment as last
4 aforesaid, General Fremont, acting for and on behalf of the Government of the United States, entered into an agreement and contract with your petitioner, whereby it was agreed between your petitioner and the said General John C. Fremont, acting for and on behalf of the Government of the United States aforesaid, that if he, your petitioner, would continue in the military service of the United States, rendering like service as had been theretofore rendered by him as hereinbefore set forth, that the said Government of the United States would pay to your petitioner such sum as said services were reasonably worth, the said General Frement then and there agreeing with your petitioner that in consideration as aforesaid the amount to be paid to him should not in any event be less than the sum of $50,000.00.

That on said 12th day of August, 1861, your petitioner, acting under his said employment and contract, undertook another special and important military expedition to Memphis, Tennessee, which place he reached in due course of time, and from where he journeyed, with great difficulty and danger of loss of life, to Cairo, Illinois, where he arrived on or about the 5th day of September, 1861, his intention being to continue to St. Louis, Missouri, for the purpose of imparting to General Fremont certain important information which he had obtained; but upon reaching Cairo he found it would be impossible for him to arrive at St. Louis in time to make his information of any benefit, and he therefore immediately reported the same to General U. S. Grant, then in command of the

United States Army for the southeastern district of Missouri, with headquarters at Cairo, Illinois.

That acting upon the information given him by your petitioner General Grant at once advanced upon Paducah, Kentucky, which place he captured a few hours in advance of the arrival of the Confederate forces.

5 That at the time of his capture of Paducah, as aforesaid, General Grant seized a large amount of stores belonging to the Confederate army and valued at over $150,000.00, thereby completely frustrating the plans of the Confederate generals Polk and Pillow, whose purpose at that time was to invade in large force southern Illinois and Indiana. That in addition, to thus defeating the objects of the Confederate army as aforesaid, General Grant at the same time secured for the Union army permanent access to the Tennessee and Cumberland rivers, which ultimately led to the success of the Union arms.

That the above results were accomplished solely and entirely through the efforts of and the information obtained and given by your petitioner as aforesaid.

That on or about the 9th day of September, 1861, your petitioner, having at that time entered upon another special and important military expedition to Louisville, Kentucky, under his employment and contract as aforesaid, informed General Fremont by telegraph from New Albany, Indiana, of the formation of an expedition by the Confederate troops for the recapture of Paducah, Kentucky, upon which information General Fremont by prompt action was enabled to prevent such a result.

That this result was due solely and entirely to the information given by your petitioner as above set forth.

That on or about the 16th day of September, 1861, your petitioner, still acting under his contract and employment as aforesaid, at great risk of his life, rendered valuable service and secured certain valuable information which he imparted to General Robert Anderson, then commanding the United States Army for the district of Kentucky, which said service and information enabled General Anderson to prevent the Confederate forces from capturing Louisville, Kentucky, and entrenching themselves on the Ohio river.

6 That thereafter your petitioner, still acting under his said employment and contract as above set forth, performed many other valuable and important services to the Government of the United States, and which said services included information secured by him and imparted to various officers of the United States Army and too numerous to mention.

That while performing the services above referred to your petitioner was authorized by General Fremont to defray the expenses incident thereto, and he assured your petitioner that said expenses would be reimbursed by the Government of the United States, and that acting upon said authorization and promise your petitioner made expenditures to the amount of $3,600.00.

Your petitioner further shows that General Fremont was authorized to so employ your petitioner and to enter into such contract

with him on behalf of the Government of the United States and to bind the United States for the payment of the services so rendered by your petitioner; and that such services were of great value to the United States and were accepted by the said United States to its great benefit and advantage.

That on or about the 4th day of September, 1861, your petitioner, while rendering service under his said contract and employment, was severely wounded in the head, which wound resulted in his becoming *non compos mentis* in the month of January, 1862, in which condition your petitioner remained until the month of May, A. D. 1886.

That your petitioner, on the 18th day of November, 1861, presented his claim for compensation for the services rendered by him under his said employment and contract as hereinbefore set forth to the Treasury Department of the United States for settlement, where the same remained pending until the 25th day of January,
7 1889, upon which day it was referred by the Secretary of the Treasury to the Court of Claims for trial and adjudication by that court under the provisions of section 1063 of the Revised Statutes of the United States, by letter of that official, of which the following is a copy:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *January* 25, 1889.

"To the honorable the Chief Justice and judges of the Court of Claims:

"Under the provisions of section 1063 of the Revised Statutes of the United States, I transmit herewith to your honorable court, upon the recommendation and certificate of the Second Comptroller, the claim of Charles de Arnaud for services as military expert, now pending in the department and involving disputed facts and controverted questions of law, with all the vouchers, papers, proofs, and documents pertaining to said claim, for trial and adjudication by your honorable court as provided by law.

"Respectfully yours, HUGH S. THOMPSON,
"*Acting Secretary.*"

Your petitioner further shows that no assignment or transfer of his said claim or any part thereof or any interest therein has been made; that your petitioner is the owner thereof and is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that your petitioner has at all times borne true faith and allegiance to the United States, and has not in any way voluntarily aided, abetted or given encouragement to the rebellion against the United States, and the facts stated in this petition your petitioner believes to be true.

That there is now due to your petitioner on account of his employment and contract as hereinbefore set forth, and the services rendered by him thereunder as hereinbefore specified, the sum of $100,000.

Your petitioner therefore asks for judgment in his favor against the United States for the sum of $100,000.

JAMES COLEMAN,
*Attorney for Petitioner.*

DISTRICT OF COLUMBIA, *City of Washington,* } ss:

Charles de Arnaud, being first duly sworn, on oath deposes and says that he has read the foregoing petition signed by him and knows the contents thereof, and that the facts stated therein on his own personal knowledge are true, and that those stated on information and belief he believes to be true.

CHARLES DE ARNAUD.

Sworn and subscribed before me this 12th day of March, A. D. 1889.

[SEAL.] ALVYN W. COLEMAN,
*Notary Public.*

8 III.—*Traverse. Filed March* 25, 1889.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
*Assistant Attorney General.*

9 IV.—*Argument and Submission of Case.*

At a Court of Claims held in the city of Washington on the 17th, 18th, and 19th days of March, 1891, this cause was argued by Mr. Coleman, for the claimant, and by Mr. Rannells, for the defendants, and the case submitted March 19, 1891.

10 V.—*Findings of Fact and Conclusion of Law. Filed June* 8, 1891.

I.

The claimant is a native subject of Russia, residing in the United States. The following is a translation of the provisions of the law of Russia, according to citizens of the United States the right to prosecute claims against such government in its courts :

SECTION 1292. The decision of the court is announced to both parties according to general rules, but independently thereof a copy of the decision is forwarded to the local government institution spoken of in section 2084.

SECTION 1296. In the execution of a judgment against a government institution the claimant presents a certified abstract of the decision to the institution, which is bound to execute the judgment accordingly.

SECTION 1519. Aliens residing in Russia are subject to Russian laws, as well personally as in regard to property, and enjoy the common defense of safeguards and protection thereof.

SECTION 1288. Claims of private persons against the government institutions are governed by general rules, and are brought according to the location of the property or according to the place where the loss was sustained by the private person, or according to the place where the government institution or where the government officer is situated or resides who represents the government in court.

II.

The claimant came to this country about the year 1860, and was, prior to that time, an officer in the Russian army, where he served in the Crimean war as lieutenant of engineers, and was serving as such when the armistice was concluded between Russia and the contending allies.

III.

In the year 1861 John C. Frémont was a major general in the United States Army, in command of the western department of Missouri. In the month of August, 1861, he entered into an agreement with the claimant, by which the claimant was employed by him to go within the Confederate lines, make observations of the country in the States of Kentucky, Tennessee, and Missouri to observe the position of the rebel forces, the strategic positions occupied by them, and advise him (General Fremont) of the movements necessary to be made by the Union forces to counteract the movements of the enemy, and to facilitate the advance of our troops and aid them in attacking and repulsing the Confederate forces.

IV.

In consequence of that arrangement he did go within the Confederate lines, and, agreeably to what he was instructed to do, brought back to General Fremont full information of the kind desired, maps of the country, of various roads, the number of troops, their stations, condition, and, as far as he could judge and find out, their projected movements.

11 He was absent on that business a number of days, came back, and reported in St. Louis about the 12th of August, 1861, to General Fremont, who was so satisfied with the information that he brought, with the intelligence and sagacity he displayed in collecting it, and the usefulness of his information, that he (Fremont).

then made an arrangement for him to continue in the service of the department. About the 12th of the month of August, 1861, he again left for the country occupied by the Confederate forces to collect information. The most important part of the services rendered by him was in the beginning of the next month, September, when, with the information that he had collected, he was returning to report to General Fremont a movement of the Confederate forces upon Paducah. On reaching Cairo he found that he had only time to report to Fremont by telegraph, and reported forthwith personally to General Grant, informing him that troops were advancing upon Paducah, and that it was necessary to move immediately in order to occupy the place. General Grant did move instantly and took possession of Paducah, Ky., solely on information given by the claimant, and to the effect that the rebels were moving upon that city with a large force.

V.

The claimant was paid $600 on the following orders and receipts:

HEADQUARTERS WESTERN DEPARTMENT,
CAMP NEAR JEFFERSON CITY, *Oct.* 6, 1861.

Major Phinney, U. S. A., paymaster, etc.:

Will pay to Charles de Arnaud the sum of three hundred dollars ($300) for secret service.

J. C. FREMONT,
*Major General.*

Received, Warsaw, Mo., October 23, 1861, of Major Jas. H. Phinney, paymaster U. S. A., the sum of three hundred ($300) "for account of secret service rendered to the U. States" by special order of Major Gen'l Fremont, dated near Warsaw, Mo., Oct. 23, 1861.

CHAS. DE ARNAUD.

IN THE FIELD,
HEADQUARTERS WESTERN DEPARTMENT, *Oct.* 23, 1861.

Major Phinney will pay to the bearer, Mr. Charles de Arnaud, three hundred dollars for secret service to the United States.

J. C. FREMONT,
*Major General, Comm'n'd'g.*

Received, Jefferson City, October 6, 1861, from Major J. H. Phinney, three hundred dollars for secret service, as per special order of Major Gen'l J. C. Fremont of this date. $300.

(Signed duplicate) CHAS. DE ARNAUD.

VI.

On Jan'y 6, 1862, claimant presented his claim to the War Department, and it was reported upon by the quartermaster as follows:

No. 22.—The United States to Charles de Arnaud, Dr.

January 6, 1862.—For special services rendered to United States Government in traveling through the rebel parts of Kentucky, Tennessee, &c., and procuring information concerning the enemy's movements, &c., which lead to successful results (as per certificate hereunto appended), $3,600.

12 Q. M. GEN'L'S OFFICE, *9th Jan'y*, 1862.

In view of the certificate of Gen. Grant of 30th Nov. and the more general certificate of Maj. Gen. Fremont of 2d Jan'y, herewith, covering all Mr. Arnaud's services, the sum of thirty-six hundred dollars appears to me to be a not unreasonable compensation. I state this at Mr. Arnaud's earnest request.

M. C. MEIGS,
*Q. M. Gen'l.*

VII.

On the 13th of January the claimant went to President Lincoln and laid before him his claim with the following letters:

CAIRO., ILL., *January* 6, 1862.

Hon. A. Lincoln, President U. S. A.:

The bearer, Charles de Arnaud, has to my knowledge rendered important services to the Government. He, at the risk of his life, gave information which led to our capture of Paducah, Ky., in advance of the rebels; thereby he saved the country thousand of lives and millions of dollars. I fully indorse his certificate of Maj. Gen. J. C. Fremont. He is entitled to the largest remuneration the Government pays for such services.

Respectfully, etc., A. H. FOOTE,
*Flag Officer.*

HEADQUARTERS DISTRICT SOUTHEAST MISSOURI,
CAIRO, *November* 31, 1861.

Chas. de Arnaud:

SIR: In reply to your request, and the note from Major General Halleck presented me by yourself, I can state I took possession of Paducah, Ky., solely on information given by yourself, and to the effect that the rebels were marching upon that city with a large force. This information I afterwards had reason to believe was fully verified: First, because as we approached the city secession flags were flying and the citizens seemed much disappointed that Southern troops expected by them were not in advance of us. It was understood that they would arrive that day. I also understood afterwards that a force of some four thousand Confederate troops were actually on their way for Paducah when taken possession of by my order. A point through which many valuable supplies were obtained for the Southern army was cut off by this move, and a large quantity of provisions, leather, etc., supposed to be for the use of the

Southern army, captured. For the value and use to which these were put I refer you to General Paine, whom I left in command. Only remaining in Paducah a few hours, and being busily engaged with other matters during that time, I can make no estimate of the cash value of the stores captured.

Yours, etc., U. S. GRANT, *Brig. Gen.*

ASTOR HOUSE, NEW YORK, *January* 2, 1862.

This is to certify that Mr. Charles de Arnaud was employed by me from about the first of August in traveling throughout the rebel parts of Tennessee and Kentucky, with the object of ascertaining the strength, condition, and probable movements of the rebel forces. He made under my directions many such journeys, reporting fully and in detail upon the force of the various encampments and the condition and strength of garrisons and various works in Tennessee and along the Mississippi river. He obtained this information at much personal risk and with singular intelligence, and performed the duties entrusted to him entirely to my satisfaction. He continued on this duty until the termination of my command in the western department. His services were valuable to the Government, and I consider him entitled to the largest consideration that the Government allows in such cases or to such agents.

J. C. FREMONT,
*Maj. Gen'l, U. S. A.*

President Lincoln folded the letters together and wrote on the back of General Grant's letter the following:

I have no time to investigate this claim; but I desire the accounting officers to investigate it, and if it be found just and equitable to pay it, notwithstanding any want of technical legality or form.

A. LINCOLN.

Jan. 13, 1862.

13 Thereafter, on the next day, January 14, the Secretary of War made the following indorsement on said claim:

I have considered this claim, and cannot bring my mind to the conclusion that the sum charged is not exorbitant. I am willing to allow $2,000 in full of the claim, and the dis. clerk, War Dep't, is authorized to pay Charles de Arnaud that sum.

SIMON CAMERON, *Sec. War.*

War Dept., Jan'y 14, 1862.

The claimant was thereupon paid, under protest, by said disbursing clerk of the War Department, out of appropriation for "contingencies of the army," $2,000, and gave the following receipt:

The United States to Charles de Arnaud, Dr.

JANUARY 14, 1862.

For services and expenses as special agent of the Gov't, $2,000.
Received, Washington, January 21, 1862, from John Potts, dis-

bursing clerk for the War Department, two thousand dollars, in full for the above account.

CHAS. DE ARNAUD.

VIII.

At the time of giving the receipt in full, January 14, 1862, he was not in a state of dementia and was able to comprehend the terms of the receipt; but the effects of his wounds in the head were beginning to affect him mentally, and he was in a condition of nervous apprehension and unnaturally desirous of securing his personal safety by getting out of the country, and he accepted the money paid by the War Department in order that he might do so.

While engaged in the military service of the Gov't, as aforesaid, he received a wound in his head in the fall of 1861, from which afterwards, in the same year, he became insane, and did not recover prior to February, 1886.

IX.

About September 4, 1886, the claimant presented his claim to the Treasury Department without naming the specific amount claimed, but incidentally claimed $50,000, because he was told by General Fremont that during the Mexican war one McGoffin, a secret agent, had been paid that sum. The auditor reported to the Second Comptroller as follows:

Act of July 17, 1861, appropriated $200,000 " for contingencies of the army " (12 Statutes, 263).

This claim was paid out of above fund.

Accounting officers have no jurisdiction to open up a settlement made by War Dep't from secret service fund and determine unliquidated damages.

The Second Comptroller made the following indorsement thereon :

JUNE 29, 1888.

The within recommendation is approved. De Arnaud seems to have rendered unmistakable valuable services as a secret agent, and there appears to have been provision made for the payment of services of that nature. But this claim must be rejected pursuant to the recommendation of the 2nd Auditor, because payment in full seems to have been made and accepted years ago, and because this office has no means or jurisdiction to consider so plain a case of unliquidated damages.

That the officer was not paid commensurately with his services, and deserves recognition at the hands of Congress, seems to be amply evidenced by President Lincoln's memorandum and by the testimony of Generals Grant and Fremont.

SIGOURNEY BUTLER,
*2nd Comptroller.*

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X.

The claimant was informed of the action of the comptroller by the following letter:

WASHINGTON, D. C., *July* 10, 1888.

Captain Charles de Arnaud, Washington, D. C.:

SIR: I have the honor to inform you that your claim for compensation for services as a military expert in 1861 has been disallowed by the Second Comptroller, without prejudice, because payment in full seems to have been made and accepted years ago, and because the accounting officers have no means or jurisdiction to consider so plain a case of unliquidated damages. * * *

WILLIAM A. DAY, *Auditor.*

On the 20th of October, 1888, the claimant renewed his application to the Treasury Department and asked that the case be referred to the Court of Claims. This communication was indorsed by the Second Comptroller as follows:

JANUARY 9TH, 1889.

Respectfully referred to the Second Auditor.

The application of the claimant, Charles de Arnaud, seems to have merit. This case is plainly beyond the jurisdiction of the accounting officers, but it bears upon its face distinct marks that should give it a fuller consideration than can be accorded by the accounting officers. Furthermore, there is no adequate machinery in the accounting officers for properly sifting the very extraordinary evidence in this case. This can only be done by the Court of Claims.

With your reply, which the claimant asks be made special, stating your views on this case, please forward all the papers pertinent thereto.

SIGOURNEY BUTLER, *Comptroller.*

XI.

On January 12, 1889, the Second Auditor transmitted all the papers on file in his office to the Second Comptroller, stating that his views had been fully expressed in previous communications hereinbefore set out. The comptroller made a recommendation to the Secretary of the Treasury that the case be transmitted to the Court of Claims, which was accordingly done by the following letter of transmission:

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *January* 25, 1889.

To the honorable the Chief Justice and judges of the Court of Claims:

Under the provisions of section 1063 of the Revised Statutes of the United States I transmit herewith to your honorable court, upon the recommendation and certificate of the Second Comptroller, the claim of Charles de Arnaud for services as military expert, now

pending in the department and involving disputed facts and controverted questions of law, with all the vouchers, papers, and documents pertaining to said claim for trial and adjudication by your honorable court, as provided by law.

Respectfully yours, HUGH S THOMPSON,
*Acting Secretary.*

*Conclusion of Law.*

The claimant's petition must be dismissed.

15 VI.—*Opinion of the Court.*

RICHARDSON, *Ch. J.*, delivered the opinion of the court:

The claimant alleges in his petition that on or about the 31st of July, 1861, General Fremont, for and on behalf of the United States Government, employed him as a "military expert" to perform special and important duties; and in his requests for findings of fact he asks the court to find that the service was not that of a spy, neither was it a secret service, but was the service of a "military expert."

In the findings of fact the court has specified the services actually performed without designating them by name or character, whether those of a secret agent, a spy, or a "military expert." It was held by the Supreme Court in Totten's case (92 U. S. R., 105) that the President "might employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the Government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control." They also held that such an agent could not recover in an action at law because "the secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery."

The services of a spy in time of war are well understood in military law. They are held honorable on one side and criminal on the other, where they are invariably punishable with death. (R. S., sec. 1343; 1 Winthrop's Military Law, p. 1106, 1109.) Whether or not contracts for such service could be enforced at law it is not necessary to discuss, since the claimant disclaims that character altogether, and it is not material in the view we take of the case.

A "military expert," as a distinct official or unofficial personage, is unknown to military organizations, and is nowhere provided for in the statutes, is not mentioned in the Army Regulations, and is not recognized in any dictionary or other publication, military or otherwise, that has been called to our attention or that we have been able to find. We have always supposed that such generals as Grant, Sherman, Sheridan, and the other distinguished officers who led the Union army to victory in the late war of the rebellion were "mili-

tary experts," and were the only such "experts" employed by the United States in that conflict. The compensation sought to be recovered by the claimant in this action is greater than the amount paid to either one of those generals named for his services during the entire period of war.

It is evident from the finding that the claimant was employed in "secret service," and that his case comes within that of Totten, above referred to. Finding V shows plainly enough that in October, 1861, both he and General Frémont so regarded the service. In that month General Frémont gave him two orders on a United States paymaster of $300 each "for secret service." The claimant was paid thereon and gave receipts for "account of secret service rendered to the United States."

In the letters of General Grant, dated in November, 1861, and of Commodore Foote and General Frémont, dated in January, 1862, set out in finding VII, with which he presented his claim to President Lincoln when he was seeking pay for his services through the executive branch of the Government, and upon which the claimant relied, it is nowhere intimated that he was employed as a "military expert."

16 General Frémont's letter thus refers to claimant's services:

ASTOR HOUSE, NEW YORK, *January* 2, 1862.

This is to certify that Mr. Charles de Arnaud was employed by me from about the first of August in traveling throughout the rebel parts of Tennessee and Kentucky, with the object of ascertaining the strength, condition, and probable movements of the rebel forces.

He made under my directions many such journeys, reporting fully and in detail upon the force of the various encampments and the condition and strength of garrisons and various works in Tennessee and along the Mississippi river.

He obtained this information at much personal risk and with singular intelligence, and performed the dut-es entrusted to him entirely to my satisfaction. He continued on this duty until the termination of my command in the Western department.

His services were valuable to the Government, and I consider him entitled to the largest consideration that the Government allows in such cases or to such agents.

J. C. FRÉMONT,
*Maj. Gen'l U. S. A.*

These letters were all written just after the claimant's employment, and seem to correctly described his services.

There is no doubt that the claimant did perform valuable services, especially valuable to General Grant, who gives him credit for having communicated information on which alone he took possession of Paducah, Ky. Thus he contributed to one of the most important strategic movements during the war, and he was otherwise of use to the army. While he deserves the good will of the country and undoubtedly reasonable compensation for his services, if he has

not already received it, we are of opinion that his case cannot be distinguished from that of Totten, and that his remedy is not in this court, but in Congress.

Upon these views the case is disposed of without passing upon any of several other questions which might be raised upon the findings.

1. Whether or not the government of Russia, of which the claimant is a subject, "accords to citizens of the United States the right to prosecute claims against such government in its courts" within the meaning of Revised Statutes, section 1068, under which aliens have the privilege of prosecuting claims against the United States in this court. The findings of fact show that "aliens residing in Russia are subject to Russian laws, as well personally as in regard to property, and enjoy the common defense of safeguard and protection thereof," and that "claims of private persons against the government institutions are governed by general rules, and are brought according to the location of the property or according to the place where the loss was sustained by the private person, or according to the place where the government institution or where the government officer is situated or resides who represents the government in court."

2. Treating the jurisdiction of this court as dependent upon the transmission by the Secretary of the Treasury; whether the claim was not within the exclusive jurisdiction of the War Department to determine, on the authority of Totten's case, before the Treasury Department could act upon it at all, or whether the latter department could take up a claim which had been settled and paid through the proper department more than twenty-five years previously, open the settlement on petition of the claimant first made there after that lapse of time and confer jurisdiction on this court by transmission by the Secretary. (Alexandria, Loudon and Hampshire R. R. Co. 26 C. Cls.)

3. Treating the case as commenced either by claimant's petition or by transmission from the Treasury Department; whether insanity prevents the running of the statute of limitation as set out in the act of 1887, March 3, chap. 359, sec. 1 (24 Stat. L., 505), which, after reënacting the jurisdiction of the court with some additions and one exception, adds this proviso "that no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within 6 years after the right accrued for which the claim is made," with no exceptions mentioned.

The petition is dismissed.

17 VII.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 8th day of June, A. D. 1891, in the aforesaid cause judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Charles de Arnaud, be dismissed.

BY THE COURT.

18 VIII.—*Application for and Allowance of Appeal.*

CHARLES DE ARNAUD
*vs.*
THE UNITED STATES. } No. 16442.

And now comes the claimant, Charles de Arnaud, by his attorney, James Coleman, and prays the allowance of an appeal to the Supreme Court of the United States from the judgment of this honorable court, heretofore rendered, dismissing the petition filed by the claimant herein, and from the whole thereof.

JAMES COLEMAN,
*Attorney for Claimant.*

Washington, D. C., June 18th, 1891.

Filed and allowed in vacation June 18, 1891.

WILLIAM A. RICHARDSON,
*Chief Justice.*

19 In the Court of Claims.

CHARLES DE ARNAUD
*vs.*
THE UNITED STATES. } No. 16442.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law thereon, filed therein, of the opinion and judgment of the court, of the application of the claimant for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at the city of Washington, this 6th day of July, A. D. 1891.

Seal Court of Claims.

JOHN RANDOLPH,
*Ass't Clerk Court of Claims.*

Endorsed on cover: Case No. 14,744. Court of Claims. No. 835. Charles de Arnaud, appellant, *vs.* The United States. Filed July 16, 1891.

Office Supreme Court U. S.
FILED.
AUG 28 1893
JAMES. H. McKENNEY.
CLERK.

# Supreme Court of the United States.

## OCTOBER TERM, 1893.

**TERM No. 550.**

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CHARLES DE ARNAUD, APPELLANT,

*vs.*

THE UNITED STATES.

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## BRIEF FOR APPELLANT.

---

HORATIO J. LAUCK,
*Attorney for Appellant.*

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BYRON S. ADAMS, PR., 513 ELEVENTH ST.

IN THE

# Supreme Court of the United States.

## OCTOBER TERM, 1893.

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CHARLES DE ARNAUD

*vs.*

THE UNITED STATES.

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## BRIEF FOR APPELLANT.

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THIS CASE COMES UP ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS, JUDGMENT HAVING BEEN RENDERED IN THAT COURT ON JUNE 8, 1891.

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### STATEMENT.

The plaintiff, Charles de Arnaud, who was, from the year 1854 to the close of the Crimean war, an Engineer Officer in the Russian Army, and was well versed in military tactics, came to this country in the year 1860, and on or about the 31st day of July, 1861, being at that time a Russian citizen, entered into a contract with Major-General John C. Fremont, acting on behalf of the United States, by which he was to render certain special and important duties as military expert, and was to receive as compensation therefor such sum as said services should be reasonably worth, which compensation should not, in any event, be less than $50,000, all of which is fully set forth in the petition in the suit before the Court of Claims, which has been made a part of the present record.

The plaintiff, having faithfully performed his part of said agreement, which, Admiral A. H. Foote testifies, "saved the country thousands of lives and millions of dollars," Record, page 8, requested General Fremont to pay him the amount agreed upon as he desired to return to his home in Russia. This the General promised to do, but prevailed upon the plaintiff first to go to Cairo, Ill., for consultation with General Grant, then in command of Southeast Missouri, General Charles F. Smith, in command at Paducah, Ky., and Commodore Foote, commanding Flotilla on Mississippi River, as to movements necessary to protect Fremont's rear while he was pursuing Sterling Price in Southwest Missouri. On his return from this expedition Fremont had been suddenly superseded by General Halleck, who refused to recognize the acts and contracts of Fremont. The plaintiff then consulted with General Grant, Commodore Foote and others as to the steps necessary in order to procure a settlement of his claim, and they advised him to present his case to President Lincoln, giving him at the same time the letters set forth in Findings No. 7. On the 13th of January, 1862, he presented these letters to President Lincoln with a statement of his case to the effect that the Government of the United States contracted to pay him for his services "the largest remuneration the Government ever paid for such service, in no event to be less than $50,000, and that he had been wounded in the head and desired at once to return to Europe for medical treatment." After President Lincoln read the letter of Commodore Foote, wherein he says that the claimant, through his services rendered under said contract, "saved the United States thousands of lives and millions of dollars," he recognized the justice of plaintiff's case and endorsed his papers as follows:

"I have no time to investigate this claim; but I desire the accounting officers to investigate it, and if it be found just and equitable, to pay it, notwithstanding any want of technical legality or form. A. Lincoln, Jan. 13, 1862." (Record, page 9.)

At the same time, he supplemented this endorsement by orally instructing the plaintiff to say to the accounting officers that they should place themselves in communication with Fremont for the purpose of ascertaining the amount due with a view to payment.

About this time the plaintiff became *non compos mentis* on account of a wound in the head received by him in the fulfilment of his part of the above contract, and hence his claim was not prosecuted as per the President's order. He regained his mental powers in 1886, immediately returned to this country, and on September 4th of that year filed his claim in the office of the Second Auditor of the Treasury. On January 25th, 1889, it was referred to the Court of Claims under Sec. 1063, Rev. Stats.

The Court adjudged that the case could not be distinguished from that of Totten's, Administrator, reported in 92 U. S. R., p. 105, and hence the petition was dismissed. From this judgment plaintiff appealed.

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## ASSIGNMENTS OF ERROR.

1. The Court erred in its failure to find as a fact whether the service performed by the plaintiff was or was not "secret service," and whether such service was or was not that of a military expert.

2. The Court erred in *assuming*, in its Conclusion of Law, that said service was "secret service" and not that of a military expert, when it had not found such to be the case, as a Finding of Fact. (Record, p. 13, l. 6.)

3. The Court erred in holding that the present case comes within the rule laid down in Totten's case, not having found any facts forming a basis for such conclusion. (Record, p. 13. l, 7.)

4. The Court erred in holding that the present case could not be distinguished from that of Totten cited (Record, p. 14, l. 1), and in not distinguishing the present case from that of Totten on the ground that in the present case the services for which compensation is sought were such that the disclosure of their existence and character could be in no way injurious to the nation.

5. The Court erred in not distinguishing the present case from the Totten case in that the disclosure of the existence and nature of the services was, in the present case, made, not by the plaintiff, but by the defendant, the Government.

6. The Court erred in not distinguishing the present case from the Totten case in that in the present case the contract entered into by the Government was with an alien, and not with one of its own citizens.

7. The Court erred in not ruling that a Russian citizen residing in this country has the right to prosecute claims against the U. S. Government.

8. The Court erred in raising the question, whether it had jurisdiction from the Treasury Department, and in not ruling that it had such jurisdiction.

9. The Court erred in raising the question, whether insanity prevents the running of the Statute of Limitations as set out in the Act of 1887, March 3, Chap. 359, Sec. 1, (24 Stat. L., 505), and in not ruling that the plaintiff's case was not affected by the change in Limitations introduced by that Act.

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## ARGUMENTS.

ASSIGNED ERROR No. 1.

*The Court erred in its failure to find as a fact whether the service performed by the plaintiff was or was not "secret service," and whether such service was or was not that of a military expert.*

In its Conclusion of Law, the Court quotes the ruling by the Supreme Court in Totten's case (92 U. S. R., 105), as follows: "That the President might employ secret agents to enter the rebel lines and obtain information respecting the strength, resources and movements of the enemy; and contracts to compensate such agents are so far binding upon the Government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control." Also "that such an agent could not recover in an action at law because the secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of contract of that kind, and thus defeat recovery."

Rule 1 of this Court relating to appeals from the Court of Claims requires that the record presented to this Court shall contain "a finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the Court founds its judgment or decree."

The Conclusion of Law upon which the adverse judgment of the Court was founded is that the present case could not be distinguished from that of Totten above referred to. To warrant this Conclusion of Law, all the facts necessary to establish such analogy between the present case and the Totten case, as would make the rule in the Totten case applicable to the present case, must be proved by proper evidence, and when so proved, must, under the above rule, appear as Findings of Facts.

The cardinal fact in the Totten case upon which was based the ruling that that plaintiff could not recover for services performed for the Government, was, that such services were secret, and that the disclosure of their existence and nature might be detrimental to the Government.

Hence to bring this case under the Totten case, it was necessary to establish by proper evidence to the satisfaction of the Court, that plaintiff's services were "secret service," and that said services were such that their disclosure might be detrimental to the Government.

And the facts, if proven conclusively to the Court, would then appear among the Findings of Facts, and upon such Finding and other Findings in connection therewith, proving an analogy with the Totten case, the present Conclusion of Law could be legitimately based.

Whether the services of the plaintiff were or were not secret, were or were not those of a military expert, were or were not of such a nature as would, if disclosed, be detrimental to the Government, were fundamental questions, to be established, one way or the other, by the evidence, to the satisfaction of the Court, and to be definitely stated to be facts so found, before any Conclusion of Law could be arrived at, holding that this case does or does not come within the ruling of the Totten case.

The Court was asked by the plaintiff to find as a fact that his services were those of a military expert, and not "secret service," and by the defendant to find that said service *were* "secret services."

The Court did not find as a fact whether said services were or were not secret, were or were not those of a military expert (Record p. 12, l. 21), were or were not such that their disclosure would be detrimental to the Government.

We submit that in this respect the Court erred.

ASSIGNED ERROR No. 2.

*The Court erred in assuming, in its Conclusion of Law, that said service was "secret service," and not that of a military expert, when it had not found such to be the case, as a Finding of Fact.*

The argument as to Assigned Error No. 1 applies also here. The belief of the Court that the services for which compensation is sought were "secret service," if such belief were warranted by the evidence adduced, should have been a Finding of Fact of the Court. But the Court, while, in the second paragraph of its opinion, stating that it had not found as a fact that the services were those of a secret agent, later, in the fifth paragraph, *assumes* this to be a fact, which had not been so found, although this was a point upon which a definite finding was requested both by the plaintiff and by the defendant.

The Court then proceeds to state the evidence upon which this belief (that the services were secret) was based. This evidence is:—

(1) that the words "secret service" occurred in certain orders and receipts,

(2) that in the letters of General Grant, Commodore Foote and General Fremont, written in 1861–2, it is nowhere intimated that plaintiff was employed as a military expert.

We assign error to the Court in this respect, on three grounds:

A. That evidence which was not a sufficient basis for Finding of Fact was not sufficient basis for an assumption in a Conclusion of Law;

B. That there was not sufficient evidence to warrant the conclusion of the Court:

(1.) As to the words "secret service" in the orders and receipts in Finding VII, no evidence whatever was adduced by the defendant te establish the fact that the services here referred to were part of the services for which plaintiff now claims compensation.

Therefore said orders and receipts, wanting the link of evidence to connect them with the present case and quite unsupported by any other evidence whatever, are irrelevant to the suit at bar, especially when the inference sought to be drawn therefrom is emphatically contradicted by the sworn direct testimony of three unimpeachable witnesses,—General Fremont, who testified that at the time of making his agreement with the plaintiff it was specifically stated that his services were those of a military expert and not of a spy, and Generals Burbridge and Rosecrans who testified that such services were properly characterized as those of a military expert and not at all those of a spy or secret service man.

Moreover in the receipt of January 14, 1862, for $2,000, which undeniably applies to the services sued upon, these services are designated, not as those of a "secret" agent, but as those of a "special" agent.

In this connection we will call the attention of the Court to the fact that this payment of $2,000 was received by the plaintiff while he was *non compos mentis*, and under protest by him, all of which has been found by the Court below. (Findings of Facts VII and VIII.)

(2.) While it is true that the letters of General Grant and others nowhere intimate that plaintiff was employed as a military expert, these same letters nowhere describe plaintiff's services as "secret service." Hence the inference might just as well be drawn therefrom, that plaintiff's services were not "*secret service*" as that they were not those of a *military expert*.

C. Had the Court found as a Fact that the services in question were "secret services" the plaintiff could have taken exception to such Finding as being unwarranted by the evidence. By its present course, of assuming in its Conclusion of Law that to be a fact which it declined to find as a Finding of Fact, the Court in effect deprives the plaintiff of the right of appeal on this very essential point.

It is clear that the Court should have decided this question from the evidence and should have placed its decision among the Findings of Facts.

On these three grounds we affirm that the Court erred as set forth in Assignment of Error No. 2.

ASSIGNED ERROR No. 3.

*The Court erred in holding that the present case comes within the rule laid down in Totten's case, not having found any facts forming a basis for such conclusion.* (*Record, p. 13, l. 7.*)

The above conclusion by the Court of Claims might have been arrived at in one of two ways, to wit:

(1.) The court might find, as an ultimate fact proven by the evidence, that plaintiff's services for which he seeks compensation were "secret service." This conclusion would then appear as a Finding of Fact upon which the Conclusion of Law was based.

(2.) The Court might refuse to find, as a fact established by the evidence, that plaintiff's services, for which he seeks compensation, were "secret service," but might find certain facts established by the evidence, upon which it based the conclusion that the same principles of public policy which were held to be a bar in the Totten case were also a bar in plaintiff's.

By no other method of reasoning or train of argument could the Court of Claims come to the conclusion that the present case comes within the scope of the rulings in the Totten case.

Upon an examination of the record, the Appellate Court will perceive that the Court of Claims did *not* find as a fact established by the evidence that plaintiff's services for which he claims compensation were "secret service." Not only does this conclusion not appear among the Finding of Facts, but the Court itself calls attention to the circumstance that this conclusion had not been so found as a fact (Conclusion of Law, paragraph 2, lines 1–3).

And since the Court, having been expressly requested by plaintiff to find that his services for which he now claims compensation were *not* "secret service," and having been expressly requested by the defendant to find that said services *were* "secret service," failed to find one way or the other, it is clear that the defendant failed to prove this point to the satisfaction of the Court.

"*Affirmanti, non neganti, incumbit probatio.*"

"When an issue is properly joined, he who asserts the affirmative must prove it." Simonton *vs.* Winter, 5 Pet., 140.

"*Incerta pro nullis habentur.*"

From these rules of law, it follows that, so far as the question as to whether plaintiff's service for which he is now seeking compen-

sation was "secret service," or not, affects the merits of his case, it must be assumed that it was not "secret service."

Especially is this the case when it is remembered that it is a legal principle that when a party is deprived of his just and equitable remedy by some rule or limitation of law, the party alleging the rule or limitation in bar must be held to strict proof of the same.

We maintain, further, (1) that, the defendant having failed to prove that the services were "secret service," it is incumbent on them, as an alternative, to show that the plaintiff's services were of such a nature that the same principles of public policy which were held as a bar in the case of Totten *vs.* U. S., would also be a bar in his case, and (2), that this they have not proven.

The nature of the services in question is given in Findings III, IV and VII.

We submit that from the disclosure of such services as are there described no possible injury could accrue to the Commonwealth, the avoidance of which injury was the foundation of the ruling in the Totten case.

It is at any rate incumbent on the defendant to prove the existence of such possible detriment arising from such disclosure, since it has failed to prove that the services were "secret service," and thus to bring the case within the letter of the ruling in Totten *vs.* U. S.

Since then the Conclusion of Law must be based on the Findings of Fact, and since the latter contain neither a Finding that the services in question were "secret service," nor any Finding of any possible detriment to the public interest arising from the disclosure of the nature of the plaintiff's services, we submit that the Court erred in holding that the present case comes within the Ruling in the Totten case.

ASSIGNED ERROR No. 4.

*The Court erred in holding that the present case could not be distinguished from that of Totten cited (Record, p. 14, l. 1), and in not distinguishing the present case from that of Totten on the ground that in the present case the services for which compensation is sought were such that the disclosure of their existence and character could be in no way injurious to the nation.*

We now ask the Court to pass upon the question whether the requirements of Public Policy, as enunciated in the ruling of the Totten case, would be a bar to plaintiff's receiving his equitable compensation.

It is admitted that General Fremont made the contract in ques-

tion on behalf of the Government, and that he had full power and authority to make such contract.

But defendant's counsel, relying upon the Totten case, maintains in substance:

(i.) That the disclosure of the nature of the services which plaintiff undertook to perform or the conditions of the contract entered into would be detrimental to the interests of the nation.

(ii.) That for this reason a condition was implied that the lips of both should be forever sealed as to the nature of the services and conditions of the contract.

(iii.) That the plaintiff having disclosed these facts which were to be kept secret, cannot now maintain the action.

Each of these positions we controvert.

(i.) We deny that the disclosure of the nature of the services or the conditions of the contract would be detrimental to the common weal.

While it is the duty of the defendant's counsel to prove the affirmative of the question in issue, and while it is impossible to prove a negative, we will recapitulate the nature of the services as found in Finding III.

These were:

(1) Plaintiff was to go within the Confederate lines,

(2) make observations of the country in the States of Kentucky, Tennessee and Missouri,

(3) observe the position of the rebel forces, and the strategic positions occupied by them, and

(4) advise General Fremont of the movements necessary to be made by the Union forces to counteract the movements of the enemy, and to facilitate the advance of our troops and aid them in attacking and repulsing the Confederate forces.

The Court will see from this finding that the services performed by the claimant were those of a military expert and not of "a spy" or secret-service man. The actual language used by General W. S. Rosecrans, the late commander of the Army of the Cumberland, who was called as an expert to determine the nature and value of claimant's service, is as follows:

"I have no hesitation in saying that Captain de Arnaud's services were very special and of extraordinary military value. They are the work of a high engineer officer of rare perspicacity in judging of the strategic value of points and movements.

"Very few general officers have ever rendered services more opportune or more important to our country. Money can not compensate or measure the value of such services.

"I have had ample experience in the employment of secret-service men or spies, and paid them all prices, from $5,000 down-

wards, for a single work. But Captain de Arnaud's service has none of the qualities of a spy or secret-service man, save in the perils incurred in his daring search for the military facts to be used in guiding the action of a commanding general."

The actual language used by General Freemont in his testimony to describe the service is:

I employed him as a military expert and not as a spy, and his services were not "secret services." (Record, p. .)

From this the nature of the plaintiff's service is very clearly seen.

Can it be seriously maintained that the disclosure of these services, so valuable to the Government at the time, so honorable in themselves, and creditable to all parties concerned, can bring even a shadow of detriment to the nation?

How will the enemies of this country, which, at present at least, exist only hypothetically, ever derive the slightest benefit from their knowledge of the fact that in the war of the Rebellion a certain Col. Charles de Arnaud performed the service above specified?

We fail to perceive how in the slightest degree such detriment to the nation, or benefit to its enemies, will lie.

(ii.) Even granting the existence of such detriment, the condition of perpetual silence was not implied thereupon for two reasons:

(1.) No condition in a contract is valid wherein a party engages not to seek his legal remedy for breach of said contract; but an obligation to perpetual silence as aforesaid would be precisely such a condition.

(2.) The injury to the Commonwealth by the refusal to fulfill its contract by reason of the alleged breach of such condition would be far greater than any injury arising from such disclosure, from the general consideration that the injury to the reputation and honor of the nation from failure to fulfill its obligations is of greater moment than any material injury whatever.

Would the plaintiff ever have entered into the contract with the Government of the United States if the alleged implied condition had been an express condition, and if he had been notified that he could not claim compensation for his services, however faithfully performed, and that in so claiming he would lose his right to compensation?

(iii.) With regard to the third point, that plaintiff cannot now maintain the contract, because he disclosed the conditions of the service, which were to be kept secret, we think this is sufficiently disposed of by the above arguments, which show, first, that such condition was not implied; second, that such condition was not valid.

Moreover the argument presently offered as to the fifth assignment of error applies to the point last raised.

ASSIGNED ERROR No. 5.

*The Court erred in not distinguishing the present case from the Totten case in that the disclosure of the existence and nature of the services was, in the present case, made, not by the plaintiff, but by the defendant, the Government.*

Supposing that there was an implied condition on the plaintiff to perpetual secrecy;

A party to a contract cannot be held to a condition of said contract, when said condition has been first broken by the other party, or when there has since been an express agreement by both parties that such condition shall be waived.

This appears to have been the case in the present instance.

The vouchers, papers and documents belonging to the case were in possession of the Treasury Department, and up to that time, the condition of secrecy had not been broken.

Whereupon the plaintiff asked that the case be sent to the Court of Claims. This was assented to by the defendant, through its agent, the Secretary of the Treasury, and the papers in the case were then transmitted and made public.

The case is not altered by the fact that the plaintiff was the first to suggest the transmission, since, in a contract, it matters not which party first suggests the waiver of a condition, if both parties assent thereto.

ASSIGNED ERROR No. 6.

*The Court erred in not distinguishing the present case from the Totten case in that in the present case the contract entered into by the Government was with an alien, and not with one of its own citizens.*

An important consequence follows from this difference. Where the contract has been made with a citizen the relation is of a twofold character, (*a*) that of parties to a contract, (*b*) that of a nation, a corporate body, to a citizen, an individual member of that corporate body, owing special duties to such body.

It may thus happen that in addition to the ordinary obligations due from him as a member of a civilized society for the maintenance of that society, such as payment of taxes, etc., a citizen may, by virtue of his citizenship, be called upon to make special sacrifices. Thus he is compellable to military service, and, in general, his national obligations are paramount to his private interests. It is upon this principle that a citizen may not maintain an action against the Government for compensation justly due him, if the institution of such suit would be injurious to the public weal. It is in virtue of his *citizenship* that the nation can impose this obligation on him.

In the present stage of civilization, in which the human race is divided into separate nations, each jealous to maintain its independence and the integrity of its territory, and to defend the persons and property of its citizens against foreign aggression, the government of each nation finds itself called upon to provide two distinct sets of laws.

One of these has for its object the regulation of the intercourse between man and man, the units composing the social organism; the other provides for the defense of the nation against other nations.

Thus, the obligations due from any citizen are twofold, first, those due from him as a member of civilized society, for the maintenance of that society; second, those arising by virtue of his citizenship, for the maintenance of the integrity and independence of the nation of which he is a citizen.

Now, it is well settled that an alien temporarily residing in a country not his own, is under obligation to comply with all laws and regulations of the first kind, those which relate to the preservation of social order, because, although not a citizen of that unit of civilized society, the nation in which he is temporarily residing, he is still a member of civilized society as a whole; but he is under no obligation to aid or defend such nation, to which he is an alien, against other nations, because this is no part of his duty as a member of society, and because the protection temporarily afforded him by the government of that nation is a protection against the enemies of *society*, and not against the enemies of the *nation*, and ceases as soon as he leaves its territory.

He is bound by all laws which have for their object the regulation of intercourse between man and man in the community where he is residing, but he is not affected by the laws which relate to the obligations of each individual to the nation as a unit, or to the duties of citizens arising from the relations of the nation to other nations.

He owes a "local allegiance," but not the allegiance of a citizen.

"He cannot indeed be subject to those burdens that have only a relation to the quality of citizens; but he ought to bear his share of all the others * * * in a word, everything that has only a relation to his residence in the country or to the affairs which brought him thither." Vattel, Law of Nations, p. 173.

Under this principle an alien is bound by the local laws of the district where he resides, and he may be called upon to bear his share of the taxes necessary for the support of the government which gives him protection, and even to take his part in defense against savages or brigands, these being the enemies of society, but he is not compellable to military service, since that is a national concern in which he has no interest.

We have seen to what extent an alien is bound by express laws; we have now to consider to what extent he is bound by implications arising from public policy.

An implication arising from public policy is a rule of conduct, neither part of the unwritten or common law nor of the statutory law, which yet the courts will enforce as being implied from individual obligation. And just as express laws are of two kinds, those which relate to a man's duties as a member of society, and those which relate to his duties as a citizen, a member of the nation, so *implications arising from public policy* are divided into two classes, those which are based upon regard for the welfare of society, and the right conduct thereof, and those which are based upon regard for the welfare of the nation as a nation.

And just as an alien is affected by express laws relating to social obligations, but not by those relating to national obligations, so is he bound by implications of public policy of the former class, and not by those of the latter.

An alien can not be considered as having or being bound to have any special regard for the welfare of a nation of which he is not a citizen. Thus where a citizen may be called upon to sacrifice his own interests for the welfare of his country, an alien can not be required or expected to sacrifice his interests for the welfare of a country which is not his country, and there can be no implied obligation in a contract that he shall do so, if necessary.

Now let us examine the precise ground of the ruling in the Totten case, in order to ascertain whether the fact of this appellant being an alien distinguishes his case from the Totten case.

The facts are these: W. A. Lloyd made a contract with the United States to perform certain services, for which he was to receive certain compensation. He performed his part of the contract. His administrator, Totten, then brought suit against the United States for breach of the contract on their side. The ground of refusal by the Government to pay was, that by bringing suit to enforce the contract, the plaintiff had broken a condition, an implied condition, to wit, that he should never disclose its existence and character. It was not denied that plaintiff had fulfilled his part of the contract, but it was maintained that he could not recover the compensation which was justly due him, because he had brought suit to enforce it.

This ruling is totally opposed to a well-known implication arising from public policy, which is that even a *positive agreement* not to have recourse to law to enforce a contract is void. (Wharton on Contracts, p. 416.)

The ruling was, however, based upon another implication arising from public policy, namely, that it is presumed that no citizen will

perform any act that can be possibly injurious to the nation or aid its enemies, and it was held that the disclosure of the existence and nature of the contract in the Totten case might be so injurious.

In the Totten case, then, two implications arising from public policy conflicted with each other, one implication, that a positive agreement in a contract not to go to law to enforce it was void, it being held to be contrary to the public policy to obstruct free access to courts of justice, and another that it is presumed that no citizen will perform any act that can possibly be injurious to the nation, or aid its enemies. Yet of so much more weight is the latter implication, arising as it does, from political obligations, that from it is implied a condition in a contract which was not only not expressed therein, but which would otherwise have been void, even if it had been so expressed.

The following argument may be used in opposition to us:

Aliens of certain countries are by our laws permitted to sue in like manner as citizens.

But no greater right to sue can be thus granted to an alien than to a citizen.

A citizen may not maintain an action for compensation for secret service.

Hence an alien is barred in the same manner.

We reply :—There is no limitation of the citizen's right to *sue* for compensation for secret services. He can *sue* but cannot recover.

Thus there is no limitation of an *alien's* right to sue for compensation for secret services. He can, however, also recover, because his contract with the Government is different from that of a citizen, being conditioned by no implied obligation of perpetual secrecy.

The fact that an alien is given the right to bring suit in our courts against the United States on a contract has a bearing only on the machinery by which one of the parties to a contract can recover on the same. It in no way affects the contract itself or changes its conditions. The contract and its conditions must be considered by themselves and entirely independently of the Court, whether national or international, by which such contract can be enforced.

Hence it cannot be argued from the fact that an alien is given the same right to bring suit against the U. S. Government as a citizen, that therefore there is implied in his contract the same obligation on his part as on that of a citizen, unless such implied obligation solely arises from and is dependent on the citizen's right to bring suit against the Government.

The implied obligation, as a citizen, in the Totten case in no way depended on his right to bring suit, but on his duty as a citizen to sacrifice his own interest, if necessary, for the welfare of the common-

wealth. There is no such duty in the case of an alien. Hence the fact that he is given the right to bring suit in our Courts against the Government does not affect the conditions of his contract.

A similar (or perhaps the same) argument may be used under the following form: That the U. S. Government, having accorded to aliens (upon reciprocal terms) the same right to bring suit against the Government in its Courts that its own citizens have, it is implied in so doing, and such alien so suing agrees thereto, that he shall be bound by all implications arising from public policy and regard for the welfare of the nation that grants him the privilege of suing, that citizens are bound by.

A slight examination of such an argument is sufficient to show its weakness.

In the first place, it is always to be presumed that this nation desires to do what is just and right. It must not for a moment be supposed that the United States, or its government, would seek to evade fulfilment of its obligations by causing or permitting difficulties to stand in the way of determining the existence and extent of those obligations.

And since the nation must be presumed to be as anxious for the fulfilment of its obligations as is the party suing, the only difficulty being the ascertainment of those obligations, the act which gives to certain aliens the right to prosecute claims against the United States in its Courts confers equally as great a benefit upon the United States as it does upon such alien suing.

No consideration passes to such alien from the United States by such Act.

And where no consideration passes to a party, no obligation can be implied from him.

Next, even if it were the case that a consideration passed as above, the United States receives its equivalent in the same right granted to its citizens by the nation of which the alien suing is a citizen.

Further, no such act, merely changing the court of settlement of a contract, can affect the conditions of a contract existing before the passage of the Act.

Again it may be said: The obligation to perpetual secrecy did not necessarily arise from the duty of one of the contracting parties as a citizen, but was implied in the very nature of the services to be performed.

We reply: If the relation of a nation to one of its citizens plays no part in the implied condition in the contract, then the contracting parties bore precisely the same relation to each other as two individuals would. The contract must then be regarded as between two individuals, one of whom was to perform certain services and the other was to recompense him for these services and the court is

asked to infer an implied obligation on the part of one of them never to disclose the nature of those services, even though such disclosure were necessary to institute suit for compensation therefor. Even if there had been an *express* condition to this effect, such a condition would be void under the Rule of Public Policy, above cited. The Court cannot therefore *infer* such an obligation except for political reasons only, which, as above shown, are not binding on an alien.

We admit that the United States has the right through its regular legislative bodies to make laws affecting aliens residing in the United States, as has been recently decided by this court with reference to the Geary exclusion act, but the rights of aliens can only be affected by express legislation, never by implication.

There can be no implied obligation from an alien to the United States except such as would be implied between two individuals in their relations with each other.

There could be no implication that one party to a private contract should be deprived of his compensation under the contract because in bringing suit to recover he disclosed its conditions, even though such disclosure was detrimental to the other party.

The United States stands in the same relation to an alien.

ASSIGNED ERROR No. 7.

*The court erred in not ruling that a Russian citizen residing in this country has the right to prosecute claims against the U. S. Government.*

As to the right of the plaintiff, being a citizen of Russia residing in this country to prosecute claims against the Government of the United States, in its courts; this is dependent upon whether the Russian government accords citizens of the United States residing in Russia the right to prosecute claims against such government in *its* courts.

Sec. 1519 of the Russian law (Finding I) provides that: Aliens residing in Russia are subject to Russian laws * * * in regard to property, and enjoy the common defense of * * * protection thereof.

The word "common" can only mean "common to" or "the same as" Russian citizens.

Thus the meaning of the section can only be: Aliens residing in Russia enjoy the same protection of their property afforded by the Russian laws as Russian citizens enjoy.

Thus it only remains to be determined whether a Russian citizen can bring suit against the government.

From section 1288 we find that claims may be brought by private persons against government institutions under general rules,

that is, under the rules regulating suits against private persons. That the *government institution* is practically synonymous with *government* is shown by the last part of the section, viz: "Government institution or where the government officer is situated or resides who represents the government in court."

It is clear from this language that the government institution is merely representative of the government, and that in bringing suit against the government institution, a Russian citizen and therefore also an alien brings suit against the Russian Government.

Hence a Russian subject residing in this country is entitled to sue in the United States courts.

ASSIGNED ERROR No. 8.

*The Court erred in raising the question, whether it had jurisdiction from the Treasury Department, and in not ruling that it had such jurisdiction.*

Section 236, Revised Statutes, provides that: "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the department of the Treasury."

Section 277, Revised Statutes, provides that: "The Second Auditor shall receive and examine all accounts relating to * * * the contingent expenses of the War Department."

Moreover, no section of the Statutes relating to the War Department authorizes, directs or even suggests that claims such as the present should be presented to the War Department.

From the above facts it would appear that applicant, in presenting his claim about September 4, 1886, to the Second Auditor, presented it to the proper Department.

That this was the view of the Second Auditor and Second Comptroller appears from their letters and endorsements as set forth in the Findings IX and X. Their rejection was not based upon the ground that the claim should have been presented to the War Department, but that the case could only be properly treated in the Court of Claims. (See letter of January 9, 1889.)

That plaintiff presented his claim to the proper Department cannot, we think, be questioned. As to whether the Treasury Department should have transmitted the case to the War Department to determine on the authority of the Totten case, was a question for that Department to decide.

It does not appear, however, that there is any adequate machinery in the War Department more than in the Treasury Department for adjudicating this case, and we conclude that the Court will hold

arising from such disability, the language of the court being "at that instant a statute took effect, which provided that all remedy whatever for its recovery was thereby barred. Whether passed at that moment or before, we conceive to be immaterial, and that the statute cannot be applied to this case without violating a plain rule of constitutional law."

Upon these grounds the Court is asked to reverse the decisions of the court below, and to direct that judgment be rendered for the plaintiff.

HORATIO J. LAUCK,
*Attorney for Appellant.*

FILED
NOV 8 1893
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1893. No. 550.

CHARLES DE ARNAUD, Appellant,

*vs.*

THE UNITED STATES, Appellees.

## Brief on Behalf of the Appellant.

H. O. CLAUGHTON,
*Of Counsel for Appellant.*

LAW REPORTER PRINT.

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# Supreme Court of the United States.

OCTOBER TERM, 1893. No. 550.

CHARLES DE ARNAUD, Appellant,

*vs.*

THE UNITED STATES, Appellees.

## Brief on Behalf of the Appellant.

This is an appeal from a judgment of the Court of Claims.

The record purports to show eleven findings of fact and one conclusion of law, the conclusion of law, as appears from the record, not being relevant to, or deducible from any of the findings of fact.

These findings are as follows:

1. The first finding is not material to this appeal.

2. The appellant, prior to 1860, was an officer in the Russian army, who served in said army as a lieutenant of engineers during the Crimean war.

3. That in 1861, by virtue of an agreement or contract, made between him and General John C. Fremont, then commander of the Department of the West, he was employed by the said general to make observations of the country in the States of Kentucky, Tennessee, and Missouri to observe the position of the rebel forces, the strategic positions occupied by them, and *advise him* (General Fremont) of the movements necessary to be made by the Union forces to counteract the movements of the enemy, and to facilitate the advance of the Federal troops and aid them in attacking and repulsing the confederate forces.

4. That he fully and faithfully performed the services undertaken by him in the said agreement or contract, which were of great value, the most important of these services being the ascertainment by him of the strategic movements of the confederate forces upon Paducah, and his wise and skilful assumption of responsibility in reporting directly to General Grant at Cairo, and advising him that it was necessary to move immediately in order to occupy the city of Paducah, and that General Grant, acting upon this *advice alone*, did move instantly and take possession of Paducah.

5. That the appellant was paid $600 upon two orders and receipts, which upon their face show that the payments were made for secret service as per special order of General Fremont.

6. That on January 6, 1862, the appellant presented a claim to the War Department for $3,600 for *special* services or expenses.

7. That on the 13th day of January, 1862, the appellant went before President Lincoln and laid before him this other claim, as shown in a letter from Admiral Foote to President Lincoln, a letter from General Grant to the appellant and certificate of General Fremont, and on that day, the 13th of January, 1862, the President folded these papers together and on the back of the roll directed the accounting officers to investigate the claim, and if found just and equitable to pay it.

In the same finding (7) it is found that on the next day, January 14th, the War Department allowed $2,000 of the claim for $3,600 filed before that department on the 6th day of January, and that the appellant accepted the said allowance *under protest*.

8. This finding finds, first, that the appellant while engaged in the *military service* of the Government as aforesaid received a wound in his head in the fall of 1861, from which afterward, *in the same year*, he became insane and did not recover prior to February, 1886; and yet finds that at

the time of giving the receipt in January, 1862, he was not in a state of dementia and was able to comprehend the terms of the receipt; *but the effects of his wounds* in the head *were beginning* to affect him mentally, and he was in a condition of nervous apprehension and naturally desirous of securing his personal safety by getting out of the country, and he accepted the money from the War Department in order that he might do so.

9. About September 4, 1886, the appellant presented this claim to the Treasury Department without naming the specific amount claimed, *but incidentally claimed* $50,000, because he was told by General Fremont that during the Mexican war one McGoffen, a secret agent, had been paid that sum; that the auditor reported to the Second Comptroller that this claim has been paid out of the sum of $200,000 appropriated for contingencies of the army by act of July 17, 1861; that the accounting officers of the Treasury had no jurisdiction to open the case. The Second Comptroller, on June 29th, approved the action of the Second Auditor, because of the fact found by him that the $2,000 accepted under protest in payment of the claim for $3,600 filed before the War Department *seems* to have been accepted in full of this claim for $50,000, expressing, however, the opinion that such payment was not commensurate with the services rendered, &c.

10. The 10th finding refers to the notice given the appellant of the rejection of his claim by the Second Comptroller, and the recommendation of that official that the claim be transmitted to the Court of Claims.

11. This finding refers to the transmittal of the case to the Court of Claims.

It will be observed that there is no finding as to the nature of the services which were contracted for in the agreement between General Fremont and the appellant.

The only conclusion of law expressed by the court is that this case cannot be distinguished from the Totten Case, (92

U. S., 105), in which case (the opinion says) this court held that a secret agent could not *recover in an action at law* for his services because the secrecy which such contracts impose preclude any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat recovery.

THE ERRORS COMPLAINED OF.

First. The Court of Claims erred in not finding as a fact that the services contracted for in the agreement between General Fremont and the appellant were those of a "military expert."

Second. The Court of Claims erred in finding a conclusion of law not applicable to or deducible from any finding of fact found by the court.

Third. The Court of Claims erred in finding as a conclusion of law that this case is not distinguishable from the Totten Case.

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Practically the findings of the Court of Claims is a bill of exceptions, in which the facts proved and not the evidence are set forth.

Under this practice this court cannot consider the evidence, because it is not in the record. Although General Fremont, sworn as a witness on behalf of the appellant, had testified positively that "The amount of it was that I employed him as a military expert not as a spy; the service was not secret service;" and General Rosecrans had testified that the services rendered by the appellant under his agreement with General Fremont were "In every respect that of a military expert—nothing of the characteristics of a spy"—the fact that the appellant was employed as a military expert, though proved by such witnesses, could not have been considered by this court, because the Court of Claims had not set this forth as one of the findings of fact. This is what the appellant complains of as error. The

Court of Claims in its opinion (Record, p. 12,) states as follows: "In the findings of fact the court has specified the services actually performed, without designating them by name or character, whether those of a *secret agent*, a spy, or a 'military expert.'"

The petition (page 2 of Record) alleges that the appellant was employed as a military expert to perform *special* and important duties—as hereinafter set forth—and the appellant requested the court to find this fact. Inasmuch as there is no finding of fact to the effect that the appellant was not employed as a military expert, and the nature of the contract is such that it might be construed to be a contract for the services of a military expert, and the parties at the time the contract was made *understood* and agreed that it was a contract for the services of a military expert, the court ought to have found as a fact that the appellant was employed as a *military expert*, and not so finding, was error.

SECOND ERROR.

The Court of Claims erred in finding as a *conclusion of law*, that the contract was one for "secret service," because whether it was for secret service or not is a question of fact, and if found at all, should have been found as *a fact*. Every contract for services, which are to be secretly performed, is not a contract for *secret service*, in the sense in which this contract has received the condemnation of the Court of Claims. If this was so, then every ambassador would be in the *secret service* as a spy is in the secret service, or a detective is in the secret service.

The court, in the opinion (Record 13), states as follows: "It is evident from the finding that the claimant was employed in the secret service." The opinion does not state in which finding this is evident. Finding nine finds that the Second Auditor held that *this claim was paid* from the secret service fund, but we are not interested in the decision of the Second Auditor; we cannot appeal from that decision.

The Court of Claims did not find as a fact that the claim had been paid out of any fund.

Again, finding five shows that the sum of $600 has been paid to the appellant out of a secret service fund by the order of General Fremont. If the order and receipt set out in finding five proved the fact that the contract under consideration was for *secret service*, and that this $600 was paid on account of that contract, the court was bound to find this as a *fact*, and was not authorized to find as a conclusion of law what it was its duty to find as a fact.

Was it in view of either of these findings, and if so, which of them, from which the court concluded as matter of law, that the appellant was employed in "secret service?" Neither of them separately nor both of them together would justify the finding of such a fact. If they are only evidence tending to prove the fact, and that is all that can be claimed, then they ought not to have been set out in the finding of the court, because the court is forbidden to set out the evidence, and to do so is error.

The reason why it is not competent for the court to set out any part of the evidence is that if any part is set out the whole of it should be, because this court must have all the evidence in the case, if any of it, in order to pass upon the soundness of the judgment appealed from. It is for this reason that a bill of exception setting out the evidence must certify that it contains all the evidence offered at the hearing.

Take this case as an illustration. Concede that these findings (three and five) are evidence tending to show that the contract sued on was for secret service; if there was other evidence positively disproving that such was the nature of the contract, that, too, ought to have been contained in the findings, or this court would not have before it the *case* made before the Court of Claims. Let us suppose that General Fremont, examined as a witness for the appellant and cross-examined by the defendant, had sworn

that he did not employ the appellant as a spy, but as a "military expert," and that the service was not secret service, would not the omission of this evidence in the finding, while the evidence tending to prove that it was secret service was certified up, be manifest injustice to the appellant? Is it not evident that the existence of such evidence given by such a witness, uncontradicted and unimpeached, would have accounted for the refusal of the court to find as a fact that the contract was one for "secret service?"

Again, by the way of argument, suppose that the evidence set forth in finding five as tending to prove that the contract was for secret service had been found by the defendant in the archives of the Government after the evidence in the cause had proved that the $600 in said finding mentioned had been used to pay the telegrapher furnished to the appellant, should not this evidence have been certified up?

And the error of the Court of Claims becomes more manifest when we consider the question of fact which, in the opinion of the court, was decisive of this case. This is a claim based upon a *verbal* contract. The interpretation of that verbal contract involves the ascertainment of a fact, and this question of fact is by the law referred to the jury. The jury passes upon the meaning of a verbal contract, the court upon the meaning of a written contract.

The Court of Claims has the functions both of a jury and the court.

On the jury side of the court the Act of its organization imposes upon it the duty of finding all the facts proved in the case, and on its judicial side to decide what is the law applicable to the facts which it has found.

What this verbal contract was, as *a fact* should have been found by the court. Having found the fact that the contract was for secret service, then the conclusions of law that no action could be brought on such a contract would have been appropriate.

Instead of finding the fact, the court declines to find any fact at all, and instead of exercising its *quasi* jury juris-

diction it specifies the services actually performed, which is simply specifying *evidence* tending to prove what sort of employment the verbal contract was for. What employment was contracted for should have been found as a fact on the jury side of the court.

The court, in the opinion, states "that it is evident from the finding that the claimant was employed in '*secret service.*'" That can only mean that it is evident from the *evidence* set out in the finding that the claimant was employed in "secret service," for the court had refused the request for findings of fact whether the employment was "secret service" employment or not.

This was error. The court has no jurisdiction to certify the evidence, or any part of it, and to certify a part of the evidence only, if it were permissible, would be most unjust.

Taking the whole of the decision together, we find the *court*, as a conclusion of law, finding two distinct things, one of *fact* and the other of law, namely, that the employment was "secret service," a question of fact, and that, being secret service, as a matter of *law* laid down in the Totten Case, the claimant could not recover. This was error.

Perhaps the error of the court complained of in the second assignment of error could not be more clearly illustrated than by a careful analysis of that portion of the opinion on page 13, found in the following words: "Finding five shows plainly enough that in October, 1861, both he and General Fremont so regarded the service."

This is not the application of the law to a fact which had been found by the court. It is merely an argument from a portion of the evidence certified up. What is the fact which should have been found as such in order to justify the court in concluding that this case came within the ruling in the Totten case? Plainly, that the contract in this case was for secret service.

The court at this point is not rendering a decision, but arguing from the evidence. "Finding five plainly shows,"

says the Court of Claims—but this court does not want the Court of Claims to argue for it what finding five shows. The only use finding five can serve in the consideration of the case is, What does finding five *find?* It absolutely finds nothing but this, that a part of the evidence in the case were those orders and receipts! If this evidence *plainly enough* showed that the contract was for secret service, the court was bound to find as a fact that the contract was for secret service. This was a verbal contract, and the interpretation of it was a matter of fact, not a conclusion of law, to be argued from the evidence either in whole or in part.

THIRD ERROR.

The Court of Claims erred in finding as a conclusion of law that this case is not distinguishable from the Totten Case.

And this for two reasons:

This conclusion of law involves two distinct propositions: 1st. That "it is evident from the finding that the claimant was employed in the 'secret service;'" and, 2d, that, conceding that it was a contract for secret service, that it comes within the Totten Case.

I.

It is not evident from the finding that the claimant was employed in secret service.

This will become manifest from an examination of the findings.

Finding eight (Record, p. 10) finds that the appellant was engaged in the *military* service of the Government; and while engaged in that service he was wounded. Finding three (Record, p. 6) states, that under the agreement with General Fremont "the claimant was employed by him to go within the Confederate lines, make observations of the country in the States of Kentucky, Tennessee, and Missouri: *to observe the position of the rebel forces, the strategic positions*

*occupied by them, and advise him (General Fremont) of the movements necessary to be made by the Union forces, to counteract the movements of the enemy, and to facilitate the advance of our troops and aid them in attacking and repulsing the Confederate forces.*

That finding is evidence of what the contract was. Is there anything in that evidence that justifies the conclusion that the contract was for "secret service?" Might not the appellant have worn his captain's uniform while engaged in the service called for by this agreement? Were not these services of the highest military character? To ascertain and report *strategic positions*, and *advise* General Fremont of the *movements necessary to be made by him* to counteract the movements of the enemy, and to facilitate the advance of the Union troops, and aid them in attacking and repulsing the Confederate forces. Who but a "military expert" could contract for the rendering of such services as these? To *decide* what positions of the enemy were *strategic*, and *advise* General Fremont of the movements *necessary to be made* by *him*, as General, to counteract the stategy of the enemy! As we contemplate the nature of this contract, and realize what the appellant engaged to do, and the confidence that General Fremont had in his ability to carry out his engagement, the inquiry is naturally suggested, who is this officer, so trusted and confided in?

The answer is, as set forth in finding two (Record, p. 6), that he was a Russian gentleman, who owed no duty either legal or moral to the United States; that he had recently been a lieutenant of engineers in the Russian army, and had served through one of the most famous campaigns known to history, and therefore brought to the service of this Government, under his contract with General Fremont, the experience of a veteran as well as the intrepidity of a hero. Such was his genius, skill, and valor, that General Fremont confided to the appellant the *movements of the army* which he commanded—acting upon his opinion as a strategian, and his advice as a "military expert."

Finding four (Record, p. 6,) shows how deserving he was of all the confidence which General Fremont imposed in him. This finding as evidence in support of the claim of the appellant that he was employed as a military expert, and that the services he rendered under that contract were valuable, states that General Fremont was so well satisfied with the intelligence and sagacity, and the usefulness of his information, that he continued him in the service of the department (of the West); and further, that the most important part of the services rendered by him was that he had ascertained the strategic movements of the Confederate commanders in the proposed attack on Paducah, and being unable to communicate personally with General Fremont, like a general, he assumed the responsibility of reporting directly to General Grant at Cairo and *advised him*—General Grant—that *it was necessary* to move *immediately* in order to occupy the place. What then? Why this—General Grant, *solely* upon this information and *advice, did move instantly* and took possession of Paducah, reaching that city in advance of the rebel troops, who were moving upon the city with a large force!

Is there anything in this finding from which "*it is evident* that the claimant was employed in the 'secret service?'" To whom is the credit due for the capture of Paducah? This finding is evidence to prove that it was due *alone* to the appellant.

If we were to pause to inquire what was the value of that service, history would inform us that it gave the Union army the permanent key to the Tennessee and Cumberland rivers, turned the tide of war in favor of the Union, and contributed in an incalculable degree to the suppression of the rebellion. If we turn to this record for information as to the value of these services, we learn, in finding seven, (Record, p. 8,) that Admiral Foote, in a letter to President Lincoln, states that these services of the appellant saved to the country thousands of lives and millions of dollars!

The Court of Claims, in the opinion (Record, p. 12), states one of the requests for findings of fact, was that the court should find that the service (under the contract) was not that of a spy, neither was it secret service, but was the service of a military expert! This request for finding the court refused to grant. The court refused to find, as a matter of fact, what was the nature of the service contemplated by the agreement and rendered by the appellant. Instead of doing this it finds, as evidence of what the nature of the contract was, the service actually performed, without designating them, either as "secret service," those of a spy, or of a military expert. But these services were not the only evidence of what the contract was. The appellant, Gens. Fremont and Rosecrans and others, were examined as witnesses and testified as to what the contract was and as to what the services really were. The opinion quotes the certificate of General Fremont in full as evidence to show what was Gen. Fremont's opinion as to the nature of the service, and refers to the letters of Admiral Foote and General Grant for the same purpose, and argues that it is nowhere intimated that he was employed as a military expert, and adds that these letters were all written just after the claimant's employment and seem to correctly describe his services. This language would imply that there was something before that court more recent than those letters and that certificate, and therefore less reliable. Could it have been that some more recent testimony had proved that the services were other than (in the opinion of the Court of Claims) those letters and that certificate seemed to correctly describe? However that may be, it is confidently submitted that there is nothing in the findings which makes it evident, either as an inference from evidence or (if such a conclusion is possible) as a conclusion of law, that the claimant was employed in "secret service."

II.

But suppose it were conceded that it was evident from this evidence that this was a contract for "secret service,"

it would be still legally impossible to hold that this case comes within that of Totten, and cannot be distinguished from it, because there is no analogy between them whatever.

All that this court decided in the Totten Case was *that a secret service agent could not sue for his compensation for the reason that such action on his part, by giving publicity to his contract, would be a breach of it.* Totten's Case was dismissed, because he had broken his contract by bringing an action to enforce it. The appellant did not do this. He did not bring an action to recover upon his claim. This is what he did do: He presented his claim to the President of the United States, the commander-in-chief of the army, who had the right both to authorize and to ratify a contract for "secret service." The appellant had the right to do that. In doing that "he did not commit a breach of the contract or expose the secrets of the Government, to the serious detriment of the public interests." He presented his claim to his employer and asked for payment. The President, who was perhaps as well qualified to judge as to whether this was a secret service employment as the best lawyer in the land, after examining the very papers which are set forth in these findings, authorized the accounting officers of the Treasury to investigate and pay the claim. He did not direct it to be paid out of any contingent fund or secret service fund, but referred it to the same officials that investigate and settle ordinary claims and contracts. The reason of the law which forbids the institution of a suit in the Court of Claims would as well forbid the presentation of it to the accounting officers of the Treasury for settlement, for they do not sit with closed doors. Was the President of the United States guilty of a violation of the duties of his high office when he directed this contract for "secret service" to be made public? If this was a disclosure of secrets of state, the appellant was not responsible for it. This act of the President was no breach of the contract on the part of the appel-

lant. But let us suppose that this was indiscreet action on the part of President Lincoln; that he made this disclosure of state secrets under a misapprehension of the nature of the contract, yet, after the disclosure had been made by the President, it were surely no offence on the part of the appellant to act under the directions of the President. That was just what he did. In obedience to the directions of the President, the appellant presented his claim to the accounting officers of the Treasury—just in the condition these documents were when handed back to him by the President, indorsed with the order to his subordinate officers to investigate and settle the claim.

If by the action of these officers publicity was given to the secrets of state, involved in the investigation which their chief and head of the Government had directed, how would this have impeached the integrity of the appellant or made him obnoxious to the charge that he had broken his contract by exposing secrets of state? Nor is the appellant responsible for the greater publicity given to that contract by the action in the Court of Claims. He did not bring his action in the Court of Claims. He did not wish to sue in that court. He by the direction of President Lincoln presented his claim to the accounting officers of the Treasury with the order of the head of the Government and of that department to pay it, if just and equitable. He insisted that the evidence offered by him established the justice and equity of his claim and demanded that the accounting officers of the Treasury should obey that order and investigate and allow the claim. For reasons satisfactory or not to them they refused to obey that order, refused to investigate and settle the claim. Even then the appellant did not withdraw his papers and institute proceedings in the Court of Claims.

The claim was transmitted to the Court of Claims by the Secretary of the Treasury upon the recommendation of the Second Comptroller.

From all this it is very apparent that this case is not within the Totten Case, and that it is altogether distiuguishable from it.

This brings us to the consideration of the question that is conclusive of error in the judgment of the Court of Claims.

The only ground of that judgment was that this case comes within the Totten Case, and is not distinguishable from it. The Court of Claims does not refer to the question of its jurisdiction, except to state that it did not pass upon that question.

It leaves the whole case open—the contract—the value of the services, everything that could be involved in a judgment upon the merits. We shall, before this brief is closed, allude to these questions simply because the court in its opinion referred to them.

The text of the opinion of the Court of Claims is the opinion of this court in the Totten Case. Let us now refer to that opinion.

The court held in that case, upon the facts in that record, that the claimant had, by the very act of instituting his suit, broken his contract, and therefore could not recover upon that contract.

The principle of law upon which that decision was based is not distinctly stated. The authorities referred to by the court are those which refer to the rules of evidence applicable to cases which involve in their prosecution the disclosure of state secrets, the exposure of which would be detrimental to the public interests. The conclusion is, action cannot be maintained because it is unlawful to prove the case. This seems to be a reasonable deduction from the opinion of this court in the Totten Case.

If this be so, it follows, that inasmuch as the privilege in respect to the production of the evidence could be waived by the Government, the privilege of objecting to the bringing of the action could as well be waived. If we are right

in this proposition, the next question to be considered is, who is to determine whether or not the privilege of objecting shall be waived? Upon this question this is the language of the text books.

> "And where a Minister of State subpœned to produce public documents objects to do so, on the ground that their publication would be injurious to the public interests, the court ought not to compel their publication, *and the question* whether the production of such document would be injurious to the public service must be determined by the *head of the department* having the custody of the paper, and not by the "*judge.*"
>
> 1 Wharton on Evidence, (2d Edition, Sec. 604.)

And the law of the text books is fully sustained by all of the decisions.

In the case of Beatson *vs.* Skene, the court said:

> "It appears to us, that the question, whether the production of documents would be injurious to the public interests, must be determined, not by the judge, but by the head of the department having the custody of the papers."
>
> Beatson *vs.* Skene, 6 H. and N., 853.

In the case of Gray *vs.* Pentland, the court said:

> "As to the Governor in this case being compellable to give the deposition in writing transmitted to him, I am inclined to think it cannot be done. It must be a matter within *his discretion* to furnish or refuse it, and this on grounds of public policy.
>
> Gray *vs.* Pentland, 2 Serg. and R., 23.

In the case of Dawkins *vs.* Lord Rokby, the Court of Exchequer Chamber held that the proceedings of a military court which had been transmitted to the commander in chief and held by him on behalf of the Sovereign, could not be produced, except by the *command or permission of Her Majesty.* 8 Q. B., 265. And this decision was affirmed by the House of Lords. W. N., 1876, p. 154.

And in the case of Worthington *vs.* Scribner, Mr. Justice Gray delivering the opinion of the court said:

> "Courts of justice, therefore, will not compel or allow the discovery of such information without *the permission of the Government.*"
>
> 109 Mass., 487.

This, considered as a political question, seems to have been judicially settled upon the same principle. Whether or not the facts connected with such questions can be made public, depends upon the will of the depository of them.

In the case of Marbury *vs.* Madison, the court said:

> "In such cases the acts (of the President) are his acts, and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and being intrusted to the Executive, the *decision of the Executive* is conclusive."
>
> Marbury *vs.* Madison, 1 Cranch, 166.

To the same effect is the decision in 1 Burr's Trial, pp. 186–187.

Mr. Greenleaf states the question decided in that case in the followiing language:

> "The President of the United States and the Governors of the several States, are not bound to produce papers or disclose information communicated to them, when, in *their judgment*, the disclosure would, on public considerations, be inexpedient."
>
> 1 Greenleaf, Ev., Sec. 251.

In the light of these authorities, is it not evident, that the question of whether or not the disclosure of the facts upon which this claim is based—conceding it to be a claim for "secret service"—would be detrimental to the public interests was a question for the President alone, he being the commander-in-chief of the army, and the head of the Gov-

ernment? And, if this be so, did he not by his reference of the claim to the accounting officers for investigation, determine that the disclosure of the facts of the case would not be detrimental to the public interests? And later, when the case was under investigation by the order of the President, in the Treasury Department, did not the Secretary of the Treasury, by his transmittal of the case to the Court of Claims, determine the nature of the claim, and further, that a prosecution of the claim in that Court would work no harm to the public? This is the language used by the Secretary of the Treasury: "I transmit herewith to your honorable court, upon the recommendation and certificate of the Second Comptroller, *the claim of Charles de Arnaud, for services as a military expert*, now pending in the Department * * * *with all the vouchers, papers, and documents pertaining to said claim for trial and adjudication*, by your honorable court. * * *" (Record, p. 11).

Was this not a waiver upon the part of the Executive of any privilege to object to the disclosure of the evidence in support of the claim? Was it not a declaration, that in his judgment it was a claim for services as a military expert?

Does not this exercise of Executive discretion distinguish the case from the Totten Case, even if it be a claim for "secret service?"

The claimant appears from the opinion of the Court of Claims to be "*persona non grata*."

At page 12 the court say: "'Military expert,' as a distinct official or unofficial personage, is unknown to military organizations and is no where provided for in the Statutes, and is not mentioned in the Army Regulations and is not recognized in any dictionary or other publication, military or otherwise, that has been called to our attention. We had supposed that such generals as Grant, Sherman, Sheridan and other distinguished officers who led the Union army to victory in the war of the rebellion were 'military experts,' and were the only such experts employed by the United States in that conflict."

The court seems after all to realize that there were "military experts" in the employ of the United States, and that they were Generals Grant, Sherman, Sheridan and "*other distinguished officers*" who led the Union army to victory in the late war of the rebellion. The Court of Claims was quite right. Captain Charles de Arnaud, the appellant, was one of the *most distinguished* of the "other distinguished officers." What was one of the most distinguished services of that whole war? The evidence in this cause and the verdict of history affirm that the capture of Paducah was one of the most distinguished services of the war; and who was the hero of the capture of Paducah? Remember, no battle was fought. The capture of Paducah with all its blessings to the Union was the highest strategy. Which of the military experts named in the vocabulary of the Court of Claims is entitled to the credit of that strategy?

Gen. Grant certifies that it was *solely* due to the appellant. Admiral Foote certifies that it was the services of the appellant that led to the capture of Paducah?

Notwithstanding all this evidence in the record that the appellant was a great "military expert," and that the valuable services he rendered under his employment were the services of a "military expert," this military expert, so well known to these distinguished leaders in the late war and so honored by them, remains still a myth to the Court of Claims!

The Court of Claims seems to be greatly disturbed by the fact that the compensation claimed by the appellant under his contract is greater than the amount paid to either of the generals named for his services during the entire period of the war. Surely, the court does not mean to maintain, as a judicial expression, that an officer could not recover the amount due under an express contract because other officers, no matter how much more distinguished and worthy, had, by contract, agreed to serve for a smaller compensation!

*In resume.* The appellant claims under a contract, authorized and ratified by the President of the United States, commander-in-chief of the army and the head over all of the executive departments.

This claim was presented to him in the capacity of head over the Department of War, and he ordered his subordinates of the Treasury Department to investigate and pay it.

While pending in the Treasury Department, under this order of the President, the Secretary of the Treasury, by an official act in which he declares that this is a claim for services as a military expert, transmits it to the Court of Claims, with all the vouchers, documents, &c., to be tried and adjudicated by that court.

The claim was duly presented before that court. The most distinguished leaders in the late war were examined as witnesses in behalf of the claimant, and the claimant being satisfied that the evidence established the claim, closed the case, placed it upon the trial calendar, and went to trial.

The Court of Claims, without adjudicating the case, for which purpose it had been transmitted to that court, dismissed the petition upon the ground that it came within the rulings made by this court in the Totten Case without having found as a fact the fact upon which the court decided the Totten Case, and although it appears from the record that the facts of this case are altogether different from those adjudicated by this court in the Totten Case, as we respectfully submit has been clearly shown by this brief.

The most convincing argument that can be made in the case is a simple statement of the facts.

The appellant, a distinguished foreigner, who owed neither allegiance nor service to this Government, espoused the cause of the Union, and his courage, skill, and experience so impressed General Fremont that he employed him under an express contract to perform services of the most important character. He fully performed the contract on his

part, resulting in advantages to this country, which can never be accurately estimated. In the performance of these services he received a terrible wound, which not only incapacitated him from service, but induced a mental derangement which lasted for more than twenty-four years, and left him after the recovery of his reason, a physical wreck! A heroic service, a blighted life, a cheerless decline, and a premature grave!

This is the history of the bosom friend and beloved compatriot of Fremont and Grant, Foote and Anderson! As such President Lincoln said of him that this country owed him beyond the debt now claimed under an express contract, a great debt of gratitude besides. From the treatment which he has received he does not hope for anything from the gratitude of the country, but he does ask that the debt due him under this express contract be paid, and that the country he did so much toward saving, may not add injustice to ingratitude.

Respectfully submitted,

H. O. CLAUGHTON,
*Of Counsel for Appellant.*

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1893.

CHARLES DE ARNAUD, APPELLANT,
*v.*
THE UNITED STATES, APPELLEE.
No. 550.

## BRIEF OF ARGUMENT ON BEHALF OF APPELLEE.

# Supreme Court of the United States.

OCTOBER TERM, 1893.

CHARLES DE ARNAUD, APPELLANT,
*v.*
THE UNITED STATES, APPELLEE. } No. 550.

## BRIEF OF ARGUMENT ON BEHALF OF APPELLEE.

Several briefs have been filed in this court for the appellant. In one of said briefs appellant's counsel make the following statement:

> Practically the findings of the Court of Claims are a bill of exceptions, in which the facts proved, and not the evidence, are set forth. Under this practice this court *can not consider the evidence because it is not in the record.* (Appellant's second brief, p. 4.)

The rule or regulation upon the subject, which was prescribed by this court, is as follows:

> In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such

appeals are allowable, they shall be heard in the Supreme Court upon the following record, *and none other:*

1. A transcript of the pleadings in the case of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

The record contains: A reference of the claim to the Court of Claims by the Secretary of the Treasury (Rec., pp. 1, 11, 12); appellant's petition (Rec., pp. 1 to 5); the general traverse (Rec., p. 5); eleven findings of fact (Rec., pp. 5 to 12); the court's conclusion of law (Rec., p. 12); its opinion (Rec., pp. 12 to 14); its judgment (Rec., p. 14); and the appeal to this court.

Undoubtedly the evidence before the Court of Claims, which has not been embodied into the findings of fact, and is not certified to this court, is not in the record here, and can not be considered by this court; but notwithstanding the statement in appellant's brief to that effect, and notwithstanding the rule or regulation prescribed by this court for appeals from the Court of Claims, to which we have referred, the attorneys for appellant in all of their briefs have stated, and to a considerable extent have relied upon, matters of fact and matters of evidence which are

not contained in the findings of fact, and are nowhere to be found in the record before this court.

We call the court's attention to this question in the beginning because the briefs filed for appellant are largely made up of such matters, which are unsupported by the record.

The propriety of the judgment complained of is to be ascertained not from such extraneous matter, but from a consideration of the pleadings, the findings of fact, the conclusion of law, and the judgment of the court, which together constitute the case presented for review in the record as it stands before this court.

For the assignment of errors in the judgment complained of we must, it is true, have recourse to the briefs of the attorneys for appellant.

We shall not, however, attempt to follow the method of argument adopted by them, but will consider the views presented in their briefs in a different order.

1. Did appellant ever have any valid claim for the compensation here demanded for services?

2. Has he been paid for the services rendered by him?

3. Has he any right of action against the Government for the amount demanded?

Such appear to be inquiries proper to be considered on this appeal, and in pursuing them we are restricted to the facts ascertained by the Court of Claims.

## I.

### AS TO THE VALIDITY OF THE CLAIM.

That appellant rendered services which were of some value to the Government between July 31, 1861, and

September 4, 1861, can not be disputed. This is attested by the acknowledgment in writing of the military commander (Maj. Gen. J. C. Frémont), for whom these services were performed (Rec , p. 9), and is ascertained by the third and fourth findings of fact (Rec., pp. 6, 7); but when we come to consider the question of what was the real value of those services it is quite another matter.

Appellant's petition in the Court of Claims (Rec., p. 2) contains the following averment:

> Said Gen. Frémont then and there agreeing with your petitioner that in consideration as aforesaid the amount to be paid to him should not in any event be less than the sum of $50,000.

But this averment is *wholly unsupported by proof*. It will be observed that the Court of Claims *do not find this to be a fact* in the case. They find that in August, 1861, said Gen. Frémont "entered into an agreement with the claimant, by which the claimant was employed by him *to go within the Confederate lines, make observations of the country* in the States of Kentucky, Tennessee, and Missouri, *to observe the position of the rebel forces*, the *strategic positions occupied by them*, and advise *him* (Gen. Frémont) of the movements necessary to be made by the Union forces to counteract the movements of the enemy, and to facilitate the advance of our troops and aid them in attacking and repulsing the Confederate forces." (Third finding of fact, Rec., p. 6.) They find that in consequence of the arrangement appellant "*did go within the Confederate lines*, and, *agreeably to what he was instructed to do*, brought back to Gen. Frémont *full information of the*

*kind desired, maps of the country, of various roads, the number of troops, their stations, condition, and, as far as he could judge and find out, their projected movements.*"

They further find that "he was absent on that business a number of days, came back, and reported in St. Louis about August 12, 1861, to Gen. Frémont, who was so satisfied with the information that he brought, etc., that he (Frémont) *then made an arrangement for him to continue in the service of the department.*" (Fourth Finding of fact, Rec., pp. 6, 7.)

Such is the contract which the court finds to have been made between the appellant and Gen. Frémont, and it will be observed that the averment in the petition that "the amount to be paid to him should not in any event be less than the sum of $50,000," is wholly wanting in and omitted from the contract as found by the court. The contract as found by the court is silent as to the amount of his compensation.

Appellant's petition in the Court of Claims (Rec., p. 3) also contains the following averment:

> That while performing the services above referred to your petitioner *was authorized* by Gen. Frémont to defray the *expenses* incident thereto, and he assured your petitioner that said expenses would be reimbursed by the Government of the United States, and that acting upon said authorization and promise your petitioner *made expenditures to the amount of* $3,600.

This averment is also *wholly unsupported* by proof. It is worse than unsupported by the proof—it is contradicted by the proof. The Court of Claims does not find that the appellant incurred or made any *expenditures* whatsoever.

It does find, however, that the appellant, on October 6, 1861, received an order from Gen. Frémont upon Maj. Phinney, U. S. Army, etc., paymaster, etc., for $300, "*for secret service.*" And that upon the same day, October 6, 1861, appellant gave Maj. Phinney a receipt for the same, which states that he received, on October 6, 1861, from Maj. J. H. Phinney, $300, for *secret service*, as per special order of Maj. Gen. J. C. Frémont, of this date.

And that subsequently, on October 23, 1861, appellant received another order from said Gen. Frémont upon said Maj. Phinney for $300 "*for secret service*" to the United States, and that upon that date he gave said Maj. Phinney a like receipt for said latter sum, which states that it was "for account of *secret service* rendered to the United States." And as to the identical sum of $3,600, which the petition avers was for *expenditures* the Court of Claims finds that on January 6, 1862, the appellant presented a claim to the War Department for said amount of $3,600, not, however, for *expenditures*, but for "*special services rendered* to the United States Government *in traveling through the rebel* ~~posts~~ of Kentucky, Tennessee, etc., and *procuring information concerning the enemy's movements*, etc., which led to successful results." (Fifth and Sixth Findings of fact, Rec., pp. 7, 8.)

It is impossible to read this voucher for $3,600 and the certificate of Quartermaster-General Meigs to said voucher and the letters of Capt. Foote, Gen. Grant, and Gen. Frémont to which he (Quartermaster-General Meigs) refers without being convinced that the claim for $3,600 was a claim for appellant's *services*. None of said officers

say anything about his *expenses*, but speak of his services. They each address themselves to how much his *services* were worth. (Rec. pp. 8, 9.) All of his services were rendered prior to January 6, 1862. Appellant has rendered no services since that date, and hence at that time he must have considered that $3,600 would be a full and adequate compensation for the whole of his services to the Government. He was not then trying to make it any larger. His sole effort at that time was to get the Quartermaster-General up to the point of recommending that much, which the latter states he only did at Mr. Arnaud's *earnest request*. (Rec., p. 8.)

But even this sum was considered by the Secretary of War too high, for he says:

> I have considered this claim, and *can not bring my mind to the conclusion* that the sum charged is not *exorbitant*. I am willing to allow $2,000 *in full of the claim*, and the disbursing clerk, War Department, is authorized to pay Charles de Arnoud *that sum*. (Seventh Finding of fact, Rec., p. 9.)

On January 14, 1862, the appellant was paid said sum of $2,000, and gave a receipt therefor, which states that it is "*in full for the above account.*" (Seventh Finding of fact, Rec., p. 10.)

Notwithstanding the Secretary of War, in 1862, considered that $2,000 was the *maximum* that should be paid to appellant in full settlement of his entire claim, and the appellant himself then thought that $3,600 was ample remuneration, yet he now is asking for the same services nothing less than the sum of $100,000 (Rec., p. 5), and

he asks this sum in addition to the $600 (Rec., p. 7) and the $2,000 (Rec., p. 10) which he has already received.

About September 4, 1886, the appellant presented his claim to the Treasury Department *without naming* the specific amount claimed, but *incidentally* claimed $50,000, because in some casual conversation he had been told by Gen. Frémont that during the Mexican war one James W. Magoffin, a *secret agent*, had been paid that sum. (Rec. p. 10.)

Appellant claims that he should receive the largest compensation that the Government ever allows *in such cases or to such agents*, and he cites the case of Magoffin as being the largest, and therefore thinks that he, the appellant, should be paid at the same rate that Magoffin was paid for secret services in the Mexican war.

Now, as a matter of public history, James W. Magoffin was paid but $30,000, and of this sum only $9,600 was the amount allowed for his *services at the rate of $300 a month extending through a period of two years and eight months*. (Report of George W. Crawford, Secretary of War, to the President, April 1, 1849.) The residue, as stated in said report, was for actual losses and expenditures made by him; so that his pay for most perilous service was only *at the rate of $300 per month*.

The only evidence bearing on the value of services is the fact that this Magoffin was paid $300 per month and that the pay of the highest rank then existing, viz, major-general, was only $625 per month.

The services of the appellant were for a little over *one month*. They commenced early in August, 1861 (Rec., p. 6), and did not continue after September 4, 1861 (Rec., p. 4),

for which he has already been paid $2,600, and he is now asking $100,000 additional. This is certainly remarkable in view of the fact to which we have already referred, that on January 6, 1862, the appellant presented his account in proper form against the Government for $3,600 as his entire claim for the *identical services* for which he now demands this enormous sum.

As to the services for which the present demand is made, the only thing asserted to have been of special value is the information which he gave to Gen. Grant, who says that upon it alone he moved on Paducah. The appellant produces the statements in writing of Gen. U. S. Grant, dated November 30, 1861; Capt. A. H. Foote, U. S. Navy, dated January 6, 1862; Gen. J. C. Frémont, dated January 2, 1862, in each of which the services performed are spoken of as being of great value. They are found in the seventh finding of facts. (Rec., pp. 8, 9.) In the letters of Gen. Grant and Capt. Foote mention of appellant's services *are confined* to the movement made by these two officers on Paducah.

The so-called valuable information given by the appellant to Gen. Grant was that the Confederates under Gen. Pillow were moving on Paducah with a large force, and that Paducah was a strategic point which they wished to possess. (Rec., p. 8.) As a matter of history, Gen. Grant in person moved from Cairo at 10:30 p. m. on September 5, 1861, with a land and naval force and occupied Paducah. (War of Rebellion, Series 1, vol. 4, p. 196.)

But the same valuable repository of contemporaneous history shows that Gen. Pillow had no notion of mov-

ing on Paducah, and that Mr. De Arnaud's information was wholly unfounded.

On the 5th of August Gen. Pillow was at New Madrid, Mo., where he had been since the 28th of July. From the correspondence between Generals Polk, Pillow, and Hardie, from August 1 to August 15, 1861, it is evident that *no purpose was ever entertained of moving towards Paducah;* but the plan was for Pillow and Hardie to unite at Ironton, and Pillow was proposing to attack Cape Girardeau on his way, and Paducah was fully fifty miles east of the points threatened by the Confederate forces. (War of Rebellion, Series 1, vol. 4, pp. 626–646.)

These records were not published when the written statements of Generals Grant and Frémont and Capt. Foote were given by those Federal officers to the appellant. The Confederate records were not then accessible, and Generals Grant and Frémont and Capt. Foote then, as in 1861, regarded as valuable the information of the appellant which they had accepted as accurate and reliable, but which, in the light now shed upon it, turns out to have been wholly untrue and untrustworthy. So that upon a *quantum meruit* the appellant's demand is groundless and without merit, and he has already been paid more than his services were really worth.

## II.

HAS THE APPELLANT BEEN PAID FOR THE SERVICES RENDERED BY HIM? WAS THE AMOUNT WHICH WAS PAID TO HIM ALLOWED AND PAID AS A SETTLEMENT IN FULL OF HIS ENTIRE CLAIM? IS HE THEREBY PRECLUDED FROM NOW MAINTAINING AN ACTION FOR ANY ADDITIONAL COMPENSATION?

The court finds (Rec., p. 7) that on January 6, 1862, appellant presented his claim for $3,600 to the War Department for the same identical services for which he now seeks a recovery, and that it was *reported upon* by the Quartermaster as follows (Rec., p. 8):

*No. 22. The United States to Charles de Arnaud, Dr.*

January 6, 1862. For special *services* rendered to United States Government *in traveling through the rebel parts* of Kentucky, Tennessee, &c., and *procuring information concerning the* enemy's movements, &c., which led to successful results (as per certificate hereto appended), $3,600.

Q. M. GEN'L'S OFFICE,
*9th Jan'y*, 1862.

In view of the certificate of Gen. Grant of 30th November, and the more general certificate of Maj. Gen. Frémont of 2nd Jan'y, herewith, covering *all Mr. Arnaud's services*, the sum of $3,600 appears to me to be a not unreasonable compensation.

*I state this at Mr. Arnaud's earnest request.*

M. G. MEIGS,
*Q. M. Gen'l.*

The court also finds that on January 14, 1862, the Secretary of War made the following indorsement *on said claim* (Rec., p. 9):

> I have considered this claim, and *can not bring my mind to the conclusion that the sum charged is not exorbitant.* I am willing to allow $2,000 *in full of the claim,* and the disbursing clerk, War Department, is authorized to pay Charles de Arnaud that sum.
>
> SIMON CAMERON,
> *Sec. War.*
>
> WAR DEPT., *Jan'y* 14, 1862.

It is true that the court finds that appellant "was thereupon paid, under protest, by said disbursing clerk" (Rec., p. 9), but no form of protest could be strong enough to overcome the effect of his acts. The Secretary of War having decided to allow $2,000 *in full* of claimants unliquidated demand, he had no right to take the money nor the disbursing clerk to pay it upon any other terms. Claimants only means of protest was to refuse the money.

The only construction that can be put upon these findings of fact is that, although the appellant may, when he went before the disbursing clerk, have first objected to or protested against the partial allowance of his claim, yet that he finally *agreed* to accept and to receipt for the $2,000 *as a full settlement of his entire claim.*

Such is the wording of the receipt which he gave, and it evidences his ultimate action. (Rec., pp. 9, 10.) It was, in short, a *voluntary* settlement of a *disputed* claim for an *unliquidated* amount.

Having accepted such a payment, under such circumstances, in full settlement of such a claim, appellant can

not maintain this action for the very services which that settlement embraced and which that payment satisfied.

> Where a claim is *disputed* by the Government and the claimant *accepts* a certain sum *in settlement thereof* and gives a receipt *in full therefor* it is a *bar* to a subsequent action in the Court of Claims for any residue asserted. (*Sweeny* v. *United States*, 17 Wall., 75,78; *S. P. Murphy* v. *United States*, 104 U. S., 464.)

In Martin's Case this court said:

> In 1873 the claimant applied for the same arrears of pay as are here in question, and received from the auditor an award of $205.63. That amount was paid to the claimant, and he receipted in writing *in full* for the account. This has often been held in this court to be a *bar* to any further claim. (*United States* v. *Martin*, 94 U. S., 404.)

In Childs & Co.'s Case the claimants' vouchers, papers, and book of accounts were forcibly and without their consent, seized and taken before a commission appointed by the Secretary of War. Claimants did not submit their claim or vouchers to the commission. The commission reduced their claim and adjusted it accordingly. When claimants got back their vouchers they had to sign a receipt for them *which they signed under protest.* They subsequently accepted the amount allowed and receipted for it *without putting any protest in that receipt* which acknowledged having received such reduced amounts "*in full of the above account.*"

This court said:

> We lay out of view in this case, as in the Adams case, the *receipts* which they gave, *under protest*, in order to regain possession of their vouchers. But we

can not disregard the finding of the Court of Claims that, after Congress had appropriated money to pay the sums found due by the commissioners, the claimants received the amount so allowed, and signed upon each voucher a *receipt* whereby they acknowledged having received said reduced amount "*in full* of the above account." And at the time of receiving this payment they made no formal objection or protest, but *were required to and did sign the receipt above described.*

To avoid the legal effect of these facts it is argued that not only in giving the receipts above mentioned, but also in accepting the money for which they were given, the complainants acted under duress. We can hardly conceive of a definition of duress that would bring this case within its terms. * * * No case can be found, we apprehend, where a party who, without force or intimidation and with a full knowledge of all the facts of the case, accepts on account of an *unliquidated and controverted demand* a sum *less* than what he claims and believes to be due him, and agrees to accept that sum *in full satisfaction*, has been permitted to avoid his act on the ground that this is duress. * * * If, indeed, there was any such pressing motive in the minds of the claimants arising out of the condition of their private affairs as influenced them strongly to accept the offer of the Government, *it can not*, in the absence of fraud or constraint on its part, *invalidate the settlement.*

It seems to us that this case, under the ordinary principles of law applicable to its class, is free from embarrassment. If there had been no reference to, and no finding by, the commission it would still remain true that here was a claim, *the justice of which had been denied and the amount that was due on it had*

> *been in dispute* for nearly two years. The Government finally says to the claimants: "*We will pay you a certain sum on this disputed claim provided you will take it in full satisfaction of the whole;*" when, without intimidation, without fraud or concealment on the part of the Government, without protest or objection on their part, *the claimants accept the money offered and sign a receipt acknowledging it to be in full of the whole claim.* Is not this a legal and binding compromise of the disputed demand? *Is it not a voluntary adjustment of the matter in dispute* between the parties? * * * In this view of the case it is of no avail to urge that the Court of Claims has found that the whole claim was just and ought to be paid. (*United States* v. *Childs*, 12 Wall., 243, 244, 245.)

And so in Clyde's Case this court held that:

> *Receiving payment* of a sum of money for a *disputed claim* against the Government and *giving a receipt in full therefor*, will, in the absence of proof of any mistake, be deemed a *satisfaction* of the claim. (*United States* v. *Clyde*, 13 Wall., 35.)

It is submitted that the payment of the $2,000 which was made by the authority of the Secretary of War was in settlement of a *disputed* claim which had been presented for an *unliquidated* amount; that it was authorized and agreed to by the Secretary of War only upon condition that it was to be *in full of the claim* and a settlement of the *entire* claim; that the Secretary of War never agreed to said payment being made upon any other basis; nor did the disbursing clerk of the War Department. And that the *receipt shows* that the appellant (whatever he previously said or did), ultimately agreed to

the settlement upon the same basis, and accepted the $2,000 *in full of his entire claim*, and signed a receipt *in full* of the claim *without any words of protest* in said receipt. And accordingly it is submitted that the same operates as a *satisfaction* of the claim and as a *bar* to the present action.

The force and effect of this transaction was felt by the appellant when he filed his petition in the Court of Claims, and was so apparent to him that it was sought to be weakened on the part of appellant by his insistence (Rec., p. 4) that about that date and prior thereto and for a long time afterwards he was insane, and thereby incompetent to transact business, and that this receipt in full and settlement should not be imputed to him as his act. (See Petition, Rec., p. 4.)

Appellant failed, however, to establish this allegation of his petition, for the court finds the fact to be otherwise.

The eighth finding of fact ascertains and establishes the true fact to be that: "At the time of giving the receipt in full, January 14, 1862, *he was not in a state of dementia and was able to comprehend the terms of the receipts.*" (Rec., p. 10.)

Moreover from the very nature of appellants' contract public policy stamped upon it, as a part of the unwritten law of the land, a condition that he should look for his compensation *exclusively* to that fund under control of the War Department, which has been appropriated for the contingencies of the army, and to *such allowance from it* as the Secretary of War *might award*.

Such a condition this court says is implied in every such contract. (*Totten, admr.*, v. *United States*, 92 U. S., 107.)

## III.

### HAS THE APPELLANT ANY RIGHT OF ACTION AGAINST THE GOVERNMENT FOR THE AMOUNT DEMANDED.

*First.* The case falls directly within the rule laid down and enforced in *Totten's Case* (92 U. S., 105–107.)

The Court of Claims has not characterized the services by any specific title or designation—as "secret," "spy," or otherwise; but it has done what is much more to the point, and what it is respectfully submitted is much more proper for it to do—it has found just what services actually were contracted for and just what services actually were performed. It has clearly described the character and nature of the services. Whatever significance the designation—"secret" or "spy" might suggest is more fully afforded by the description of the work and service actually performed and contracted for. Yet if the name be thought material it will be seen that by both the employé and his employer the services rendered by him are described as "secret services" (Fifth Finding of facts, Rec., p. 7), and again in the Ninth Finding of facts, appellant's service is designated as "*secret service*," and as "*services as secret agent*," and stated to have been paid for out of the appropriation from which *such services* are paid, viz, the appropriation "for contingent expenses of the Army" (Rec., p. 10). And it also appears that both claim-

ant and Gen'l Frémont considered the service as of the same class as that rendered by Magoffin, which was confessedly secret service.

Just here let us say that in Totten's case the Court of Claims did not characterize the services in the findings of fact by any specific title or designation as "secret" or as "spy," etc.; but merely found, as in the case at bar, just what services were contracted for, and this court, upon such finding, held that the services themselves showed that "*secret services*" were contracted for, and that upon such contract, *even after the close of the war*, no action could be maintained. The court say:

> The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was *to proceed south and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial* to the Government of the United States, and report the facts to the President, for which services he was to be paid $200 a month.
>
> The Court of Claims finds that Lloyd *proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President; and* that, upon the *close* of the war, he was *only reimbursed his expenses.* * * * We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ *secret agents to enter the rebel lines and obtain information respecting the*

*strength, resources, and movements of the enemy;* and contracts to compensate *such agents* are *so far binding* upon the Government as to render it lawful for the President to direct payment of the amount stipulated *out of the contingent fund under his control.* Our objection is not to the contract, but to the *action upon it* in the Court of Claims.

The service stipulated by the contract was a *secret service;* the information sought was to be obtained *clandestinely,* and was to be communicated *privately;* the employment and the service were to be equally *concealed.* Both employer and agent must have understood that the lips of the other were to be forever *sealed* respecting the relation of either to the matter. This condition of the engagement, was *implied* from the nature of the employment *and is implied in all secret employments* of the Government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our Government in its public duties, or endanger the person or injure the character of the agent.

If upon contracts of such a nature an action against the Government could be maintained in the Court of Claims, *whenever an agent should deem himself entitled to greater or different compensation than that awarded to him,* the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers might be exposed, to the serious detriment of the public. A *secret service,* with liability to publicity in this way, would be impossible; and as such services are sometimes indispensable to the Government, its agents in those services MUST LOOK FOR THEIR COMPENSATION TO THE CONTINGENT FUND OF THE DEPARTMENT EMPLOYING THEM, AND TO SUCH ALLOWANCE FROM IT AS THOSE WHO DISPENSE THAT FUND MAY AWARD.

> The secrecy which such contracts impose precludes any *action* for their enforcement. *The publicity produced by an action would itself be a breach of a contract of this kind, and thus defeat a recovery.*
>
> (*Totten, admr.*, v. *United States*, 92 U. S., 105–107.)
>
> (*S. P. Allen* v. *United States*, 27 C. Cls. R., 92, 93.)

Appellant's attorneys contend that this defense has been waived, but there is nothing in the record to support such a contention.

> And were it otherwise a waiver could not be set up against the Government. In the language of this court: The Government has *not* expressly or by implication conferred authority *upon any* of its officers *to waive* defenses to which it is entitled. (*Finn* v. *United States*, 123 U. S., 232, 233.)

*Second.* Appellant alleges in his petition that *on November* 18, 1861, *he* "*presented his claim* for compensation for the services rendered by him under his said employment and contract, etc., *to the Treasury Department* of the United States for settlement, where the same remained pending until the 25th day of January, 1889." (Rec., p. 4.)

There is not one word of proof to sustain this allegation. When we look at the findings of fact we discover that this allegation is worse than unproved; it is disproved.

As we have already had occasion to point out, the court has found that on January 6, 1862, the appellant presented his claim to the *War Department*, and that the same, after passing through the hands of the Quartermaster-General, was considered and decided by the Secretary of War, who, on January 14 allowed $2,000 in full of the claim. (Rec., p. 9.) The Secretary of *War*, however, never at any time

referred the claim to the *Treasury* Department or to the *accounting officers of the Treasury*. The service was *secret service*, and had to be paid, if at all, out of the appropriation made for such service, viz, "the appropriation for contingencies of the Army." What was paid to appellant was in fact paid out of that appropriation. (Rec., p. 10.)

The first two payments were made to him by the *paymaster of the Army* (Rec., p. 7), and the final payment was made to him by the disbursing clerk of the War Department, and all of them were paid to him out of the *secret service* fund appropriated for contingencies of the Army (Rec., p. 9, 10), and the accounting officers of the Treasury have no control over the adjustment of these payments out of the secret service fund. From January 14, 1862, when appellant received the sum of $2,000 as a settlement of his claim in the *War* Department he did nothing else in regard to it until September 4, 1886, when the Court of Claims finds that he presented his claim to the Treasury Department. (Ninth Finding of facts, Rec., p. 10).

This is the first time (September 4, 1886) that the appellant presented his claim to the *Treasury* Department as found by the Court of Claims. (Ninth Finding of facts, Rec., p. 10.) Fifteen years had elapsed since his services were rendered and since his claim first accrued, and about fourteen years and eight months had elapsed since his claim had been finally passed upon and settled in the *War* Department before appellant's claim was presented to the *Treasury* Department.

It was then too late even for the Secretary of *War* to *open* or re-examine his claim if he had tried to do so.

> The law has been too well settled to be in doubt at this time, that public officers *can not open and re-examine cases decided by their predecessors* except for fraud, mistake in matters of fact arising from errors in calculation, or newly discovered material evidence. (*United States* v. *Bank of Metropolis*, 15 Peters, 401; *Lavalette* v. *United States*, 1 C. Cls. R., 149; *Jackson* v. *United States*, 19 C. Cls. R., 509; *State of Illinois* v. *United States*, 20 C. Cls. R., 348, 349, 350, 351.)

In Jackson's Case (*supra*) the Court of Claims, after reviewing the previous decisions, said:

> As the result of these decisions we must hold that the decision of Secretary Sherman *in rejecting the claim* was a settlement so far as the Treasury Department is concerned under the administration of his *successor;* and being settled by his decision it is not open for examination and adjustment on the merits. (19 C. Cls. R., 509.)

And in the case of the State of Illinois the Court of Claims, reviewing all of the decisions, says:

> The transfer of a claim from one of the Departments to this court does not carry with it an increase of power over the matter in controversy, and if the head of the Department be himself without jurisdiction or power to aid the claimant the latter's legal position is not bettered by the transfer. * * * What, then, is the power of the Secretary of the Interior over the case at bar, one branch of which was decided by Secretary Thompson in 1858 and the other by Secretary McClelland in 1855? As early as 1825 Mr. Wirt, then Attorney-General, in a letter to the Secretary of the Navy, said that he had understood it to be a "rule of action prescribed to itself by

each administration to consider the acts of its predecessors conclusive as far as the Executive is concerned."

The Supreme Court, in the case of the Bank of the Metropolis, decided in 1841 (15 Peters, 401), limited the right of an executive officer to review his predecessor's decisions "to mistakes of fact arising from errors of calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced;" in 1849 Mr. Attorney-General Toucey held (5 Op., 29) that the principle of *res judicata* applied to claims "thus deliberately considered and rejected;" his successor, Mr. Reverdy Johnson (5 Op., 240), ruled that the decision of a Secretary of the Interior, "whether right or not," could not be overruled by his successor; and these decisions were followed consistently by other Attorney-Generals, among them Mr. Black (9 Op., 300 and 387), Mr. Stanbery (12 Op., 169 and 356), Mr. Hoar (13 Op., 33 and 226), Mr. Akerman (13 Op., 387), Mr. Bristow (13 Op., 457), and Mr. Williams (14 Op., 275), * * * and Mr. Bates in the Dart Case, wherein he reviewed and followed the opinions of his predecessors.

In 1864 *Lavallette* v. *United States* (1 C. Cls. R., 149) this court decided "that the head of a Department cannot, in a matter involving judgment and discretion, reverse the decision and action of his predecessor even in a matter relating to the general affairs and management of the business of the Department;" and the Supreme Court held, in *Stone* v. *The United States* (2 Wall., 535), that one "officer of the Land Office is not competent to cancel or annul the act of his predecessor;" finally, this court, at the last term, in Jackson's Case, followed the path so clearly defined by sixty years of consistent rulings, and held that

> the Secretary of the Treasury could not *reopen* a claim adjusted by his predecessor. * * * We are of opinion that the Secretary of the Interior has not authority to reopen the claims of the State of Illinois specified in his letter to this court dated February 13, 1884, and in this view of the case we express no opinion as to the correctness of the decisions made by his predecessors.
>
> *The State of Illinois* v. *United States* (20 C. Cls. R., 348, 349, 350, 351).

In *Connor's Case* the claimant, in December, 1871, gave the first information, etc., of a violation of the internal-revenue laws by one William Stout. Proceedings were thereupon instituted by the Government for collection of the penalty thereof. At the time this information was given section 179 of the act of June 30, 1864, as amended by the *act of July* 13, 1866 (14 Stats., 145, c. 184), was in force; but the right which as an informer he might have had to a share in a fine, penalty, or forfeiture under the provisions of said acts was taken away by the *act of June* 6, 1872 (17 Stats., 256, c. 315, sec. 9). On May 13, 1873, a settlement was made with Stout, and he paid the United States in lieu of and as a penalty $800.

On March 22, 1875, Connor presented an application to the Treasury Department for his informer's share, which was indorsed "too late," and nothing was done thereunder.

Twelve years thereafter, on February 24, 1887, he made a second application, in answer to which he received a letter of that date from the Secretary of the Treasury, stating the facts and circumstances, and which informs him "that the case is not one in which payment of the

informer's share can be properly made at the present time because the penalty was fixed by compromise and the amount paid after August 1, 1872, when the act of June 6, 1872, took effect. The letter concludes by saying—

> It is presumed that on this declaration you can take the case to the Court of Claims and obtain an adjudication.

This court said:

> The tenor of the Secretary's letter is not to the effect that he is adjudicating upon the claim. On the contrary, the findings show that *twelve years before* the claim had been presented and practically determined against the claimant. *The statute of limitations would bar a suit commenced, as this was, twelve years after such adjudication.* (Rev. Stat., sec. 1069; *Finn* v. *United States*, 123 U. S., 227.) Obviously, from the language of the letter, the Secretary did not intend a reopening of the case and a new adjudication, but simply to furnish to the claimant such information as the records of his Department disclose. (*United States* v. *Connor*, 138 U. S., 66, 67.)

And in another case the Court of Claims said:

> The Secretary of War, being precluded from paying this claim, could not transmit it here to seek its payment under the general appropriations made by Congress to pay the judgments of this court. * * * When the head of an executive department is forbidden by law to pay a claim, there can arise no disputed fact, no controverted question of law, nothing in which our decision can affect a class of cases, nothing in which it can furnish a precedent for the future action of an executive department, nothing in which any authority, right, privilege, or exemption can be claimed or denied under the Constitution

> of the United States, *to warrant the transmission* of the claim to this court, or to confer upon this court a *jurisdiction*, derived through the Department, which is expressly denied to the Department. The duty of the executive officer is to *deny the claim* irrespective of all such consideration. He has *no power* to assist the claimant to any other remedies. (*Hart* v. *United States*, 15 C. Cls. R., 427.)

All of appellants' claim over and above the $2,000, which was paid to him on January 14, 1862, was by the decision of the Secretary of War of that date *rejected*.

This rejection not only concluded his successors in office as we have just pointed out, but was far reaching in its effect. The claim so adjudicated and rejected was for the services of a "spy" or "secret agent," or whatever you may choose to call the appellant—it was for "*secret service*." The appellant was not expected to go within the enemy's lines *with a brass band* proclaiming his errand *from the housetops*. Neither he nor his employer could for one moment have contemplated the performance of the services contracted for in any other than the most *secret* manner. The fund from which such secret services were payable was appropriated for "contingencies of the Army." (Rec., p. 10.) It was exclusively under the control of the War Department; and by the very nature of the contract the appellant was obliged to look for his compensation to *that* contingent fund of the department employing him, and to *such allowance from it* as those who dispensed *that fund* might award to him. (*Totten* v. *United States*, 92 U. S., 107.)

It was peculiarly and exclusively within the jurisdiction of the War Department to determine the validity and amount of his claim before it could have any standing with the accounting officers. In Allen's Case it was held that the rejection by the Secretary of War of such a claim closes "the *only avenue* for its settlement by the executive officers" and "removes an obstacle in the way of the operation of the statute of limitations." The latter "is left to apply to it with all its force and effect," so that after the statute has run the case can not be referred by a committee of Congress to the Court of Claims under the Bowman Act.

Allen's Case is not unlike the case at bar. In that case the petition alleged that in the fall of 1861 Springfield, Mo., was occupied by Federal troops, under command of Gen. John C. Frémont; that at the same time the confederate army was encamped not far off, and its size and intentions were uncertain; that Gen. Frémont was in great need of accurate information as to the number and purposes of the enemy, and authorized one Martin J. Hubble to obtain a competent man to visit their camp and secure this information, stating that $1,000 would be paid for such service; that in accordance with such authority from Gen. Frémont said Hubble engaged David C. Allen to render said service upon the terms stated; in pursuance of said engagement Allen visited the confederate camp and returned with valuable information, which he imparted to Gen. Frémont in person; that thereafter, *by direction of Gen. Frémont*, Allen made another trip to the confederate camp, resulting in the capture of a confederate spy;

that a third time, *at the request of Gen. Frémont*, Allen undertook to visit the enemy's camp and secure information, but while so absent Gen. Frémont was succeeded by Gen. Hunter.

Springfield was evacuated by the Union forces, and on Allen's return he was made prisoner by the Confederates; that the agreement to pay Allen $1,000 for the first-mentioned service was *approved and ratified* by Gen. Frémont, but he, Allen, never received said sum or any part thereof; that no definite agreement was made as to the *amount* Allen should receive for his *subsequent* services aforesaid, but that considering the great peril incurred by him and the value of the information which he secured for the Union authorities, such services were reasonably worth not less than $500 for each trip; making all together $2,000. The claim was presented to the Quartermaster-General in April, 1868. It was suspended by the War Department in August, 1869, for claimant to obtain the testimony of Gen. Frémont, and it was subsequently rejected in 1870. On April 16, 1888, it was transmitted to the Court of Claims by the Committee on War Claims of the House of Representatives.

The court say:

> The rejection of a claim by executive officers alone does not of itself bar a claim, but it removes an obstacle in the way of the operation of the statute of limitations, and allows the latter to apply with full force. * * * The avenue open to the claimant for the settlement of his claim was the War Department, *where it accrued* and which *alone* had authority to settle and adjust it. It was *peculiarly and exclusively* within the jurisdiction of *that* Department to

determine the *validity and amount* before it could have *any standing with the accounting officers.* * * * The claimant has, in fact, been to the War Department. * * * The claim was presented to the Quartermaster-General in April, 1868, with evidence to sustain it. It was suspended by the War Department in August, 1869, for the claimant to obtain the testimony of Gen. Frémont, and it was subsequently *rejected* in 1870. The claim having been *rejected* by the *War* Department, and the *only avenue* for its settlement by the *executive officers* having thus been *closed* against it, the *bar* of section 1069 of the Revised Statutes *is left to apply to it with all its force and effect*, if this court ever had jurisdiction of the cause of action.

But another reason why the court can not find the facts, even if it never had jurisdiction under its general powers and the statute of limitations never did apply to it. The claim is for services as a *spy.* (*Totten's Case*, 96 U. S., 105, 107.) * * * A claim which, to investigate in a court of justice, is decided to be *against public policy*, and which is *alone cognizable* by the *War* Department, where it has been *considered and rejected*, is effectually *excluded from the jurisdiction of this court to find and report the facts to Congress.* (*Allen* v. *United States*, 27 C. Cls. R., 92, 93.)

The claim in Allen's case was of the same character as the claim in the case at bar, and it is submitted, that, if the consideration and rejection of *such* a claim by the *War* Department operates to effectually exclude the claim from the jurisdiction of the Court of Claims under the Bowman Act, it must of necessity exclude it from the jurisdiction of that court under § 1063 of the Revised Statutes of the United States.

For the reasons mentioned the appellant's claim on September 4, 1886, had no standing with the accounting officers of the Treasury. And just here let us say that from January 14, 1862, when the Secretary of War (whose Department alone was charged with the duty of making allowances for secret service out of the appropriation for contingencies of the Army) decided and settled the claim as above mentioned, anything over and above the $2,000 allowed by him became a disputed and rejected claim, and moreover when he went out of office, there being no one else to open or re-examine the claim or to establish the validity and amount of the same, it was not only a disputed and rejected claim, but a claim for an unliquidated amount, which the accounting officers had no jurisdiction to adjust.

Of such a claim the accounting officers of the Treasury never have had any such jurisdiction.

In Dennis's case the Court of Claims held that:

> A claim for *unliquidated* damages, growing out of written, oral, and implied *contracts*, is not one which the accounting officers are authorized to adjust. (*Dennis* v. *United States*, 23 C. Cls. R., 324; *S. P. Dunbar* v. *United States*, 19 C. Cls. R., 493; *McClure* v. *United States*, 19 C. Cls. R., 28.)

This court also has spoken upon the subject, and as to the powers of those officers has said:

> The accounting officers of the Treasury could never have been given this discretion in fixing an additional allowance, etc. The discretion is of a kind they never exercise, and, moreover, when exercised by another they cannot alter or amend what is done.

Further discussion of this point is not necessary. The powers and duties of the accounting officers are well described by the court below in the following language, with which we agree: "Those powers and duties are well understood. The Auditor merely examines and audits accounts, *neither allowing nor disallowing the same*, certifies balances and transmits the same to the Comptroller for his decision thereon. The Comptroller decides whether or not the items are *authorized by statute and are legally chargeable.* He has no *power to review, revise, and alter* items expressly allowed by statute, *nor items of expenditures or allowances made upon the judgment and discretion of other officers charged with the duty of expending the money or of making the allowances.* His duty extends no further than to see that the officers charged with that duty *have authorized the expenditures* or *have made the allowances.* (21 C. Cls. 37, 38.)

(*United States* v. *Waters*, 133 U. S. 215, 216.)

(See also *United States* v. *Adams*, 7 Wall. 480.)

*Third.* Appellant's claim was transmitted to the Court of Claims by the Secretary of the Treasury, under the provisions of section 1063 of the Revised Statutes of the United States, upon the recommendation and certificate of the Second Comptroller. (Rec., pp. 1, 11.) Said section 1063 of the Revised Statutes is as follows:

> Whenever any claim is made against *any* Executive Department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds $3,000, or where the decision will affect a class of cases or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases without regard to the amount involved in the particular case, or where any

authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of *such* Department *may cause* such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, *to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant;* and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided*, That *no case shall be referred* by any head of a Department *unless* it belongs to one of the several classes of cases which, by reason of the subject-matter and character, *the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.* (Rev. Stats., § 1063.)

The record shows that the services for which appellant claims compensation were rendered in 1861, and so his cause of action accrued at that time. (Third and Fourth Findings of fact, Rec., pp. 6, 7.)

The record also shows that appellant never presented any claim to the *Treasury* Department for said services until September 4, 1886 (ninth finding of facts, Rec., p. 10), and although the record shows that prior to that time appellant had on January 6, 1862, presented a claim for said services to the War Department (sixth finding of facts, Rec., pp. 7, 8), yet it shows that the War Department never referred the claim made upon it to the Treasury Department at any time or in any way, and that the

claim made upon the *Treasury* Department in 1886 is entirely disconnected with and unable to be traced back to the previous claim which was made upon the *War* Department in 1862, and which was then rejected as to any excess over the $2,000 paid, and consequently taking the most favorable view of the case for appellant the present action must be treated as though it had been commenced on September 4, 1886, when appellant presented his claim to the *Treasury* Department (Rec., p. 10). Such being the case there is no escape from the conclusion that appellant's claim is barred by the statute of limitations, which is as follows:

> Sec. 1069. Every claim against the United States, cognizable by the Court of Claims, shall be forever *barred* unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, *within six years after the claim first accrues*: *Provided*, That the claims of married women *first accrued during marriage*, of persons under the age of 21 years *first accrued during minority*, and of idiots, lunatics, insane persons, and persons beyond the seas, *at the time the claim accrued*, entitled to the claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. (§ 1069, R. S.)

The construction of both of these statutes is now well settled by the decisions of this court and of the Court of Claims.

In Lippitt's Case this court said:

> When the claim is of such a character *that it may be allowed and settled* by *an* Executive Department, or may, in the discretion of the head of *such* Department, be referred to the Court of Claims for final determination, *the filing of the petition* should relate *back to the date when it was first presented for allowance and settlement.* In such cases the statement of the facts, upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously, and in due time, been presented at the *proper* department for settlement. * * * Upon their transfer to the Court of Claims they are to be proceeded in as other cases pending in said court. (*United States* v. *Lippitt*, 100 U. S., 668, 669.)

In Finn's Case the claim was for certain property purchased for and delivered to the United States at their special instance and request, on or about October 14, 1863. It was never presented to any Executive Department of the Government until July 3, 1874, when it was filed in the office of the Quartermaster-General. That officer decided adversely to it and transmitted it to the accounting officers of the Treasury. It was disallowed by the Third Auditor of the Treasury June 14, 1879, and in that ruling the Second Comptroller concurred. But on July 20, 1886, the Second Comptroller *ordered the case to be opened*, and ,on August 13, 1886, the claim, with the vouchers, etc., pertaining thereto was transmitted by the Secretary of the Treasury to the Court of Claims under section 1063, Revised Statutes.

This court, Harlan, J., said:

> In any view this claim belonged to the class which, under the express words of the *Act of* 1863 (Rev. Stat., § 1069), were "forever barred," so far, at least, as the claimant had the right to a judgment in that court against the United States. The duty of the court, under such circumstances, *whether limitation was pleaded or not*, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that, etc., the claim must be put in suit by the voluntary action of the claimant, or be presented to the *proper* department for settlement, *within six years after suit could be commenced thereon against the Government.* Under the appellant's theory of the case the Second Comptroller *could open the case twenty years hence*, and upon the claim being transmitted by the Secretary of the Treasury to the Court of Claims, that court could give judgment upon it against the United States. *We do not assent to any such interpretation of the statute defining the powers of that court.*
>
> The general rule that limitation does not operate by its own force as a bar, but as a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. *An individual may waive such a defense*, either expressly or by failing to plead the statute, but the Government has *not* expressly or by implication *conferred authority* upon any of its officers *to waive* the limitation imposed by the statute upon suits against the United States in the Court of Claims.
>
> (*Finn* v. *United States*, 123 U. S., 232, 233.)

We have already pointed out that in the case at bar the character of the claim was such that it could not have been adjusted by the accounting officers of the Treasury, but even if the claim had been of such a character that it might have been adjusted by them, yet still, unless presented to *that* Department within the statutory period, it would be barred upon transmission to the Court of Claims by the Treasury Department under § 1063 Revised Statutes.

These same statutes were subsequently construed in accordance with the above decisions in Savage's Case.

That case is one where a private citizen acted as charge d' affaires in Guatemala in 1856, 1858. The claim was presented in due time to the Treasury Department, which made official inquiries of the State Department, *but the claimant did not present it to the State Department until* 1885. It was then referred to the Court of Claims by the State Department under section 1063, Revised Statutes, and the Court of Claims *held* that where a claim *was not presented to the Department in which it originated before it became barred* by the statute of limitations it *can not* be referred by *that* department to said court under section 1063 Revised Statutes, and said court *does not acquire jurisdiction by such a reference.*

The Court said:

> The claim in this case accrued nearly thirty years ago, September 14, 1858, *when the claimant's testator ceased performance of the services* for which compensation is demanded. The action was not commenced by voluntary petition, but by transmission from the Secretary of *State* under the provisions of section

1063 of the Revised Statutes, (citing and quoting from *Lippits's Case*, 100 U. S., 663; *Finn's Case*, 123 U. S., 227, and Angell on Limitations, § 196). The "*proper* Department" referred to in the statute is undoubtedly that in which the claim originated *and to whose appropriation, in case of payment, it is to be charged* (R. S., § 3675), and it is the head of "*such* Department," who may *transmit* the same to this court *when made against it.* * * * But there are many claims and demands like the one now in suit, which are not required to be made upon any other department before presentation to the Treasury Department. (Citing R. S., § 236.)

On the 30th of July, 1868, the attorney for the deceased presented his claim to Mr. McCulloch, Secretary of the Treasury, etc. On the 4th of September, 1868, the First Comptroller, who had jurisdiction of the matter, notified the attorney that the claimant had "no legal claim against the Government." This was a rejection of the claim and the end of the case in *that* Department. While pending in the *Treasury* Department the claim might have been settled and paid, *if there was an appropriation applicable to it*, or it might have been transmitted to this court by the Secretary of the *Treasury*, on the certificate of the Auditor or Comptroller, if not upon his own motion, under the statutes, independently of the State Department. *As it was not referred* to the Secretary of State, etc., it *can not be held* to have been made upon the *State* Department *by the proceedings in the Treasury.*

*It was not until fifteen years after the case had been disposed of in the Treasury Department* that the executor of the original claimant, etc., *made formal claim against the Department of State* by a letter addressed to the Secretary March 2, 1885. That letter was sent to this court by the head of the De-

partment, transmitting the claim, and was the foundation of his action in that regard. In our opinion *the presentation of it to the Department of State* was the filing of the petition in the case now before us within the meaning of the statute of limitations as interpreted by the Supreme Court in the Lippitt Case.

(*Saraje* v. *United States*, 23 C. Cls. R., 266, 268, 269; see also *United States* v. *Connor*, 138 U. S., 66, 67.)

The identical question in the case at bar came squarely before the court in the case of *The Alex., Loud. and Hamp. Railroad* v. *United States*. In that case the cause of action accrued between May 1, 1861, and March 15, 1862. On the latter date the claimant presented the claim to the *War* Department, and it was referred to the Quartermaster-General and disallowed by him. It was again presented to him on September 11, 1873, and on November 11, 1873, claimant was informed that it had been disallowed. On November 3, 1886, it was presented to the Third Auditor for settlement. *The claim has not been passed upon by the Secretary of War. The Third Auditor called upon the Quartermaster-General for information in regard to the claim, and a history of all proceedings and rulings upon it was given.* The Quartermaster-General *did not report the case to the Third Auditor, nor did he make to that officer any recommendation* about it. On June 17, 1887, the claim was *disallowed* by the Third Auditor, who certified the papers, with his decision to the Second Comptroller. On June 27, 1887, the Second Comptroller *concurred* with the Auditor in his opinion and *disallowed* the claim.

On July 5, 1887, a rehearing was applied for. On January 30, 1888, the Third Auditor *recommended that the former decision be reconsidered* and the claim referred to the Court of Claims for adjudication under section 1063, Revised Statutes. On July 23, 1888, the Second Comptroller *concurred in this recommendation* of the Third Auditor, and on September 11, 1888, the Secretary of the Treasury *transmitted* the case to the Court of Claims *under the provisions of Section* 1063 of the Revised Statutes, upon the recommendation and certificate of the Third Auditor, approved by the Second Comptroller.

The court, after citing and quoting from *Finn's Case* (123 U. S., 227) and *Lippitt's Case* (100 U. S., 663), said:

> From these decisions it results that a claim reaching this court by virtue of the provisions of Section 1063, Revised Statutes, must be shown to have been presented to the *proper* Department within six years after the cause of action accrued; that is, it must have been presented not simply to *an* Executive Department, but to "the *proper*" Executive Department, the Department *where* "*it may be allowed and settled;*" failing this, the case falls within the bar of the statute of limitations.
>
> The railroad company, plaintiffs herein, *did present their claim* to the Department of *War* promptly after the events through which they suffered loss. In due course it was ruled upon adversely by the Quartermaster-General, but no action of any kind in regard to it has been taken since by the Secretary of War, the head of the Department. He has not ruled favorably or unfavorably upon the case, *and he has not transmitted the claim to this court.* Plaintiffs, after

constant and unsuccessful effort to obtain compensation through the Quartermaster-General and Congress, made application to the Treasury Department for payment.

This was done *twenty-four years and more after the loss;* after long examination in that Department *the Secretary of Treasury transmits the claim to this court* upon the certificate of the Second Comptroller. *The Secretary of War did not refer the claim to the Treasury Department*, and if the Treasury was the *proper* executive department to "allow and settle" the claim, *it came there much too late and is now barred here by the statute of limitations.* The correspondence between the Third Auditor and the Quartermaster-General *did not operate as a transfer of the claim* from the *War* Department to the *Treasury*, for even if the Quartermaster had jurisdiction and had power to transfer it, *he indicated no intention to do so*, but simply complied with the auditor's request to furnish information.

There is no connection between the presentation to the *War* Department and the later presentation to the *Treasury*, and plaintiffs *can not in the Treasury* proceeding *avail* themselves of the presentation to the *War* Department. *To have the presentation to the War Department avail in this action the claim should have gone to the Treasury from that Department, thus completing a chain of proceedings through which the petition here can be traced back to that first filing of the claim.* The statute and the Supreme Court recognize the differing jurisdictions of the principal executive officers by the use of the words, "Proper Department." * * * Petition dismissed.

(The *Alex., Loud. and Hamp. R. R.* v. *United States*, 26 C. Cls. R., 331, 332.)

So in McClure's Case the Court of Claims said:

> We have held that to enable the court to take jurisdiction of cases transmitted by the heads of the Departments, under section 1063 of the Revised Statutes, it must appear that they were such as the Departments had authority to settle and adjust therein. (*McClure* v. *United States*, 19 C. Cls. R., 30.)

Similar decisions have been made in regard to cases referred under the Bowman Act, and the principle upon which they were decided is equally applicable to the present case. (*Pitman's Case* and *Pope's Case*.) In the first of these the court say:

> A claim can not be held to be *pending* in an executive department which has no authority in law to settle, adjust, or take cognizance of it. (*Pitman* v. *United States*, 20 C. Cls. R., 254, 255.)

And in the second of these cases the court say:

> As the Secretary of the Navy has *no jurisdiction* over the matter, the claims had no standing in *his* Department and were not "*pending*" therein within the meaning of the Bowman Act. The reference of a claim not properly *pending* in a department confers no jurisdiction on this court. To give the court jurisdiction of the case by the reference by the head of a department, it must appear that the department *itself* had jurdisdiction over the same. (*Pope* v. *United States*, 21 C. Cls. R. 52.)

It is true that in *United States* v. *Connor*, *supra*, the proceeding which the Supreme Court stated was barred was one begun by petition and not by reference, but the fact that *Finn* v. *United States*, *supra*, a reference case,

was cited as authority for this position shows the same bar would have held good had the Secretary of the Treasury attempted to refer the case.

In this connection the court's attention is also called to the fact that in the case at bar the findings of facts show that the claim was transmitted by the Secretary of the Treasury to the Court of Claims, not only as a claim which had been rejected in the manner heretofore spoken of by the War Department, but also as a claim which the accounting officers of the Treasury refused to consider because not within their jurisdiction, and which for that reason was *not reopened* by them before being transmitted.

The court finds that when the appellant presented this claim to the Treasury Department the Second Auditor reported to the Second Comptroller that the "act of July 17, 1861, appropriated $200,000 'for contingencies of the Army' (12 Statutes, 263);" that "this claim was paid out of the above fund;" and that "accounting officers have NO JURISDICTION *to open up a settlement made by War Department from secret service fund and determine unliquidated damages.*" (Ninth Finding of facts, Rec., p. 10.)

And the court further finds that the Second Comptroller indorsed thereon:

> The within recommendation is approved. * * * This claim must be *rejected* pursuant to the recommendation of the Second Auditor, *because payment in full seems to have been made and accepted years ago,* and *because this office has no means* OR JURISDICTION *to consider so plain a case of unliquidated damages.* (Ninth Finding of facts, Rec., p. 10.)

On July 10, 1888, appellant was notified by the Second Auditor of the disallowance of the claim and of these reasons therefor (Rec., p. 11).

On October 20, 1888, the claimant renewed his application to the Treasury Department, and asked that the case be referred to the Court of Claims. (Rec., p. 11.)

The court finds that the Second Comptroller's indorsement upon this communication referring it to the Second Auditor again reiterates that "*this case is plainly* BEYOND THE JURISDICTION *of the accounting officers*," but adds that "it bears upon its face distinct marks that should give it a fuller consideration *than can be accorded by the accounting officers*," and that "there is *no adequate machinery in the accounting officers* for properly sifting the very extraordinary evidence in this case," and says: "*This can only be done by the Court of Claims*," and asks him "with his reply to please forward all the papers pertaining thereto." (Tenth Finding of facts, Rec., p. 11.)

And the court further finds that—

> The Second Auditor transmitted all the papers on file in his office to the Second Comptroller, stating that his views had been fully expressed in previous communications hereinbefore set out. (Eleventh Finding of facts, Rec., p. 11.)

And then the court finds that without anything more being done "the Second Comptroller made a recommendation to the Secretary of the Treasury that the case be transmitted to the Court of Claims," which was accordingly done by the letter of transmission under section 1063, Revised Statutes, before mentioned. (Eleventh Finding of facts, Rec., p. 11.)

It is perfectly clear that appellant's claim was transmitted by the Secretary of the Treasury to the Court of Claims, not as a claim which was then *pending in his Department*, but as a claim which had been *rejected* by the accounting officers there *for want of jurisdiction*—that it was transmitted as it *then* stood, *with all of its infirmities*, to which we have referred.

By section 1063, Revised Statutes, it is expressly provided—

> That no case shall be referred by any head of a department *unless it belongs to one of the several classes of cases which*, by reason of the subject-matter and character, *the court might, under existing laws, take jurisdiction on such voluntary action of the claimant.*

If the Court of Claims *could not have taken jurisdiction* of appellant's claim upon his *voluntary action*, then by the express provision of section 1063 of the Revised Statutes the Secretary of the Treasury *could not transmit the claim to that court under said section.*

But had appellant's action been commenced in the Court of Claims by his voluntary action, instead of being transmitted, it would unquestionably have been barred by the statute of limitations, for the statute in force at the commencement of the action governs, and at that time, March 13th, 1889, the act of March 3d, 1887, had also been passed which did away with all exemption by reason of disabilities.

*Fourth.* Appellant's cause of action, if he ever had any, *accrued when his services were rendered*, and moreover the fact that it then *accrued* is wholly irrespective of the statute

of limitations; that is to say, appellant's cause of action would still have *accrued* at that time even if there were no statute of limitations applicable to it.

It can not be denied that the six years prescribed by the statute (sec. 1069, R. S.) as a bar *must be computed from the time the cause of action accrued*, and that within six years, *counting from that time*, appellant was obliged to file his petition in the Court of Claims (or present his claim to the proper department transmitting it to said Court under section 1063, R. S.) or his claim would be barred.

Unquestionably at the time appellant's cause of action *accrued* (when his services were rendered) he was laboring under no disability. His remarkable mental attainments, ability, sagacity, and information *at that time* are enlarged upon, and no one asserts this more positively than appellant himself.

It is well-settled law that no subsequent disability would suspend the operation of the statute of limitations.

*Bauserman* v. *Blunt* (147 U. S., 657).

*McDonald* v. *Hovey* (110 U. S., 621).

*Harris* v. *McGovern* (99 U. S., 168).

*Mercer's Lessee* v. *Selden* (1 How., 52, 53).

*Walden* v. *Gratz* (1 Wheat., 296).

*Savage* v. *United States* (23 C. Cls. R., 267).

It only remains to say that under the plain wording of the statute of limitations (section 1069, R. S.) appellant is clearly *not within the saving clause* of that act. The saving clause is only in favor of persons laboring under the disabilities therein mentioned "*at the time the claim accrued*,"

and when appellant's claim *accrued* he was certainly under *no disability* whatsoever as is affirmatively found. (Finding 8th, Rec., p. 10.)

So far as appellant is concerned, not being within the saving clause of section 1069 of the Revised Statutes, it is the same as though the act contained no saving clause, and his claim is clearly and undoubtedly barred.

*Fifth.* It only remains to say that the Record shows appellant to be a citizen of Russia, residing in this country. By the express provisions of § 1068, R. S., appellant can not prosecute a claim against the United States in the Court of Claims unless the Government of Russia accords to citizens of the United States the right to prosecute claims against Russia in its courts. The only laws of Russia which have been proved are those contained in the court's first finding of fact (Rec., p. 6). If there are any other laws of Russia bearing upon the subject this court can not take cognizance of them, for they are not proved. What is found by the Court of Claims upon this subject is entirely too vague, too meagre, and too general to establish this important matter, and it must be remembered that the burden of proof rests upon appellant to affirmatively establish the same. These laws certainly do not establish that Russia could be sued in its courts upon a claim for "secret service," even by a Russian citizen, much less do they establish that Russia could be sued in its courts upon such a claim by an American citizen. Nor do they establish that the Government of Russia *itself* could be sued in its courts. The burden of proof being upon the appellant upon this important feature of

his case, it is submitted that he has also failed to establish his right to prosecute his claim against the United States in the Court of Claims in accordance with the provisions of section 1068, Revised Statutes.

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